Supreme Court, U.S.
FILED

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SUPREME COURT OF THE UNITED STATES

NO._____

WESLEY R. HAMMONS,
Appellant,

v.

U.S. RAILROAD RETIREMENT BOARD,
Appellee,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAILROAD RETIREMENT BOARD MAY SATISFY ITS BURDEN OF PROOF IN STEP FIVE OF THE SEQUENTIAL PROCESS IN CASES INVOLVING BOTH EXERTIONAL AND NON-EXERTIONAL LIMITATIONS BY CONCLUSIVELY APPLYING THE MEDICAL VOCATIONAL GUIDELINES.

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAILROAD RETIREMENT BOARD'S FINDING THAT THE CLAIMANT RETAINED THE RESIDUAL FUNCTIONAL CAPACITY TO PERFORM A FULL RANGE OF SEDENTARY WORK WAS BASED UPON SUBSTANTIAL EVIDENCE.

III. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT FOUND THAT THE RAILROAD RETIREMENT BOARD HAD NOT COMMITTED AN ERROR OF LAW IN FAILING TO CONSIDER ALL OF THE CLAIMANT'S NON-EXERTIONAL LIMITATIONS WHEN DETERMINING HIS RESIDUAL FUNCTIONAL CAPACITY.

IV. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAILROAD RETIREMENT BOARD MAY USE THE MEDICAL VOCATIONAL GUIDELINES TO CONCLUSIVELY DECIDE A CLAIM WHEN THE CLAIMANT IS IMPAIRED BY CHRONIC PAIN.

V. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DECIDED THAT THERE EXISTED SUBSTANTIAL EVIDENCE TO SUPPORT THE RAILROAD RETIREMENT BOARD'S FINDING THAT THE CLAIMANT'S ALLEGATIONS OF DISABLING PAIN WERE NOT CREDIBLE.

VI. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE STANDARD FOR REVIEW IN A RAILROAD RETIREMENT BOARD APPEAL WAS THAT THE RECORD MUST COMPEL THE HEARINGS OFFICER TO DETERMINE THE CLAIMANT WAS DISABLED.

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OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. A copy is attached hereto as Appendix A. The Decision of the Hearings Officer, which is adopted by the United States Railroad Retirement Board, is unreported. A copy is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

(1) The ORDER AND JUDGMENT of the United States Court of Appeals, Tenth Circuit was dated October 7, 1993.

(2) Review to this Court is sought pursuant to Title 28 U.S.C. Section 1254a.

(3) On December 28, 1993, the Supreme Court of the United States entered an Order extending the time for filing a petition for a Writ of Certiorari to February 4, 1994.

STATUTES AND REGULATIONS INVOLVED

The texts of the following statutes and regulations relevant to the determination of the present case are set forth in Appendix C: 45 U.S.C. 231 (a) (1) (v); 45 U.S.C. 355(f); 45 U.S.C. 231g; 28 U.S.C. 1254(a); 20 C.F.R. 220.187, Appendix 1; 20 C.F.R. 220.100; 20 C.F.R. 220.26; 20 C.F.R. 404. 1520; 20 C.F.R. 220, Appendix 1 (1992); 20 C.F.R. 201.00(a), Appendix 2; 20 C.F.R. 220.132; 20 C.F.R. 201.00(h), Appendix 2.

STATEMENT OF CASE

Wesley Ray Hammons, herein referred to as the claimant, is a forty-one year old male, born June 22, 1952. He was thirty-nine years old on the date of his hearing. He has twelfth grade education. He received an Honorable Discharge from the Armed Forces of the United States of America on July 15, 1973. He worked for the Burlington Northern Railroad for a

period of 15 years before being injured on the job in December, 1985. On January 2, 1986 he became disabled and never returned to work. After conservative treatments did not alleviate the pain, surgery was performed in December 1988 wherein a two level fusion was performed of the claimant's lumbar spine. He experienced some relief directly after the surgery but it was minimal in duration. He attempted physical therapy, wore a back brace, a TENS Unit, took massive quantities of both prescription and non-prescription pain relievers, and was examined and treated by physicians on a regular basis. When the claimant realized that he was unable to do even his normal daily activities on a sustained basis, he filed his application for period of disability and employee's disability annuity on January 25, 1990. The Applications were denied initially and again upon reconsideration. At the request of claimant, a hearing was held on July 15, 1991 before Hearing Officer Scott Kuhlmey. A vocational expert did not testify either at the hearing or through written statements. By decision dated November 29, 1991, the Hearings Officer denied Claimant's Applications finding that: (A) The Claimant meets the service requirements for a disability annuity under Section 2(a) (1) (V) of the Railroad Retirement Act. (B) The claimant is not currently working or engaging in substantial gainful activity. (C) The claimant's impairments, do not meet or equal in combination any impairment listed in Section 220.187, Appendix 1 of the Railroad Retirement Board's Regulations. (D) The Petitioner is a younger individual with a high school education. (E) The Claimant retains the residual functional capacity for sedentary work. (F) In spite of the restrictions testified to by the Petitioner because of his impairments, there are significant numbers of jobs remaining which the claimant can perform. On January 22, 1992 claimant requested review by the Railroad Retirement Board of the hearing officer's decision. By Order dated June 9, 1992, the Railroad Retirement Board affirmed and readopted the hearings officer's decision of November 29, 1991. Thus, the hearings officer's decision of November 29, 1991 became

the final decision of the Railroad Retirement Board. A Petition for review was filed with the United States Court of Appeals for the Tenth Circuit on April 13, 1993, pursuant to 45 U.S.C. 231(a) (1) (V) which incorporates 45 U.S.C. 355(f) and 45 U.S.C. 231g therein. The Tenth Circuit entered an Order and Judgment on October 7, 1993 affirming the decision of the Railroad Retirement Board. This Petition for Writ of Certiorari to this Court is sought pursuant to Title 28 U.S.C. 1254 a.

ARGUMENT

45 U.S.C. Section 231 (a) (1) (v) provides for the payment of a disability annuity under the Railroad Retirement Act to "individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment". The Railroad Retirement Board has adopted regulations to govern what is meant by regular employment and how this determination is to be made. In this regard, 20 C.F.R. Section 220.26 provides:

> "An employee . . . is disabled for any regular employment if he or she is unable to do any substantial gainful activity because of a medically determinable physical or mental impairment which meets the duration requirement defined in Section 220.28 . . . to meet this definition of disability, a claimant must have a severe impairment, which makes him or her unable to do any previous work or other substantial gainful activity which exists in the national economy. To determine whether a claimant is able to do any other work, the Board considers a claimant's residual functional capacity, age, education and work experience."

The Board has adopted a sequential process, 20 C.F.R. Section 220.100, to be used in determining the question of disability. Those steps, in essence, are as follows:

1. A Claimant who is working and engaging in substantial gainful activity will be found to be not disabled regardless of his or her impairments, age, education or work experience.
2. A claimant who does not have a severe impairment will be found to be not disabled without consideration of age, education, or work experience. A severe impairment is one that significantly limits the claimant's physical or mental abilities to do basic work activities.
3. If a claimant is not working and has a severe impairment which meets or equals a listed impairment in Appendix 1 of the Board's disability regulations, a finding of disabled will be made without consideration of the claimant's age, education, or work experience.
4. If the claimant's impairment is severe but still does not meet or equal a listed impairment, the Board will review the claimant's residual functional capacity, and if a claimant is nonetheless capable of performing work he or she has done in the past, a finding of not disabled shall be made. To make this determination, a review is made of the claimant's residual functional capacity and the physical and mental demands of his or her past work.
5. If a claimant is unable to do his past relevant work because of his or her impairments, the claimant's residual functional capacity and age, education and work experience will then be reviewed to determine whether the claimant can do other work that exists in the national economy.

This is the same sequential process that has been adopted by the Secretary in Social Security Administration disability cases. 20 C.F.R. 404.1520. Aspros v. United States R.R. Retirement Bd., 904 F.2d 384, 386 (7th Cir. 1990). Therefore, "it is accepted practice to use social security cases as precedent for railroad retirement cases." Burleson v. United States

R.R. Retirement Bd., 711 F.2d 861, 862 (8th Cir. 1983). They will be used interchangeably herein.

The Railroad Retirement Board and the Secretary have determined that the claimant bears the burden of proof regarding the first four elements and the Railroad Retirement Board and Secretary have the burden on element five if the claimant satisfies the first four. Cox v. Califano, 587 F.2d 988, 990 (9th Cir. 1978); Turner v. Heckler, 754 F.2d 326 (10th Cir. 1985). To aid in meeting this step-five burden, Medical Vocational Guidelines, 20 C.F.R. pt. 220. App. 2 (1992) have been developed. These are sometimes referred to as the "grids".

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAILROAD RETIREMENT BOARD MAY SATISFY ITS BURDEN OF PROOF IN STEP FIVE OF THE SEQUENTIAL PROCESS IN CASES INVOLVING BOTH EXERTIONAL AND NON-EXERTIONAL LIMITATIONS BY CONCLUSIVELY USING THE MEDICAL VOCATIONAL GUIDELINES.

The United States Court of Appeals for the Tenth Circuit has decided that neither expert vocational testimony nor other evidence of jobs the claimant could perform despite his restrictions are necessary in claims involving both exertional and non-exertional impairments. This decision conflicts with the decisions of other United States courts of Appeal and the decisions of this Court. Failure to apply correct legal standards is grounds for reversing a determination as to claimant's disability status. Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987); Aspros v. United States Railroad Retirement Board, 904 F.2d 384, 386 (7th Cir. 1990).

In this case, it is not disputed that the claimant had satisfied his burden regarding the first four elements and had therefore made his prima facie case. The claimant alleged and provided evidence of both exertional and non-exertional impairments.

Some of the non-exertional impairments being severe pain, decreased range of motion in shoulders, shaking of extremities after activity, inability to perform activity at heights, in temperature extremes and around vibrations. The Railroad Retirement Board, without the expert testimony of a vocational expert, found that the claimant could perform the full range of sedentary work and was not disabled. This decision was based entirely upon the medical vocational guidelines (grids), 20 C.F.R. Section 220, App. 2. The Railroad Retirement Board made no specific findings regarding the limitations of these non-exertional factors.

The Tenth Circuit concluded that since the Railroad Retirement Board found that the claimant has the residual functional capacity to perform the full range of sedentary work, the non-exertional impairment of pain must have been insignificant. Therefore, use of the grids was not error. The Tenth Circuit cites, dicta contained in footnote 6 in Channel v. Heckler, 747 F.2d 577, 582 (10th Cir. 1984) in support.

It is the assertion of the Claimant that the medical vocational guidelines should not be conclusively used by the Railroad Retirement Board when both exertional and non-exertional impairments are present.

This Court in Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L. Ed. 2d 66 (1983) stated that the medical vocational guidelines are applicable "only when they described a claimant's abilities and limitations accurately." Since the grids do not take non-exertional limitations into consideration, the grids should not be conclusively applied when both exertional and non-exertional limitations exist. The other Courts of Appeal follow this Court's precedential holding. In Grant v. Schweiker, 699 F.2d 189 (4th Cir. 1983), it is stated "The grids may satisfy the

Secretary's burden of coming forward with evidence as to the availability of jobs the claimant can perform only where the claimant suffers solely from exertional impairments. To the extent that non-exertional impairments further limit the range of jobs available to the claimant, the grids may not be relied upon to demonstrate the availability of alternate work activities. Instead, in such cases the Secretary must produce a vocational expert to testify that the particular claimant retains the ability to perform specific jobs which exist in the national economy."

In Allen v. Secretary of Health & Human Services, 726 F.2d 1470 (9th Cir. 1984), the Administrative Law Judge recognized that the claimant could only work in an environment free of respiratory irritants such as dust and fumes, but concluded that this was not a significant non-exertional impairment and applied the grids. The Ninth Circuit ruled that this reliance on the grids was improper because the Administrative Law Judge's conclusion as to the claimant's respiratory problems was not supported by any evidence of jobs the claimant could perform despite his restrictions.

This also appeared to be the rule in the Tenth Circuit prior to this case. In Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991) it stated, "Whenever social security claimant's residual functional capacity is diminished by both exertional and non-exertional impairments, Secretary of Health and Human Services must produce expert vocational testimony or other similar evidence to establish existence of jobs that claimant can perform in national economy."

In this case, the Railroad Retirement Board recognizes the existence of the non-exertional limitation of pain but did not produce evidence of jobs the claimant could perform despite

this restriction. The Railroad Retirement Board did not even recognize the other non-exertional impairments. The only reference to available jobs being the reference to the 200 separate unskilled sedentary occupations identified by the Railroad Retirement Regulations. The Railroad Retirement Board fails to mention that approximately 85 percent of these jobs are in the machine trades and benchwork occupational categories. 20 C.F.R. 201.00(a) App. 2. It would be interesting to hear evidence explaining how the machine trades are not affected by the claimant's non-exertional impairment of inability to work around vibration.

Claimant urges the Court to refuse to adopt any exception to the general rule that the grids are not to be applied conclusively when non-exertional and exertional limitations are present. To allow the Railroad Retirement Board to use the grids when non-exertional impairments exist would lead to inconsistent and arbitrary decisions.

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAILROAD RETIREMENT BOARD'S FINDING THAT THE CLAIMANT RETAINED THE RESIDUAL FUNCTIONAL CAPACITY TO PERFORM A FULL RANGE OF SEDENTARY WORK WAS BASED UPON SUBSTANTIAL EVIDENCE.

The United States Court of Appeals for the Tenth Circuit has decided that the medical vocational guidelines (grids) may be used in circumstances when the claimant's limitations do not exactly fit the grid categories. This decision violates and conflicts with the applicable decisions of this Court and of the other Courts of Appeal. We are guided by the substantial evidence standard. 45 U.S.C. Section 355(f); Universal

Camera Corporation v. NLRB, 340 U.S. 474, 95 L.Ed. 456, 71 S. Ct. 456, (1951); Richardson v. Perales, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corporation, ibid at 477.

The claimant asserts that the finding of the Railroad Retirement Board that he is able to perform a full range of sedentary work is not supported by substantial evidence. "Evidence is not substantial if it is overwhelmed by other evidence-particularly certain types of evidence (e.g., that offered by treating physicians) or if it really constitutes not evidence but mere conclusion." Kent v. Schweiker, 710 F.2d 110, 114 (3rd Cir. 1983).

The Railroad Retirement Board concluded that the claimant could perform the full range of sedentary work. Sedentary work is defined in 20 C.F.R. 220.132 (a) as lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket file, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. The Secretary clarified this standard in SSR 83-10 wherein the standing, walking and sitting requirements are quantified. It states "Occasionally means occurring from very little up to one-third of the time. Since being on one's feet is required occasionally at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8 hour workday and sitting should generally total approximately 6 hours of an 8 hour workday. Work processes in specific jobs will dictate how often and how long a person

will need to be on his or her feet to obtain or return small articles." Additionally, the Secretary states, "Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions."

Substantial evidence does not exist that would indicate the claimant is able to perform a full range of sedentary work. The treating physician, Dr. William Piechal, found that the claimant could lift the required ten pounds only if it were at waist level. He could not lift any weight from the floor to waist level or from waist level to eye level. This limitation in and of itself is sufficient to indicate that substantial evidence does not exist for the claimant to perform a full range of sedentary work. But, the treating physician found additional limitations. The claimant is able to sit only four to five hours out of an eight hour day, not the requisite six hours. The claimant has below normal right hand grip strength and substantially below average upper extremity coordination. The claimant must alternate sitting/ standing/walking frequently. The Secretary addressed this situation in SSR 83-12 which states "most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will."

"To be placed at a particular level of residual functional capacity a claimant must be able to perform the full range of such work on a daily basis." Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987); McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982); Santise v. Schweiker, 676 F.2d 925, 934 (3rd Cir. 1982); Kirk v. Secretary of Health & Human Services, 667

F.2d 524, 537 (6th Cir. 1981). 20 C.F.R. 201.00(h) App. 2.

The substantial evidence of record indicates that the claimant cannot perform the exertional requirements of a full range of sedentary work. The only manner in which this conclusion could be found to be based upon substantial evidence is if the Railroad Retirement Board had set out legitimate reasons for disregarding the treating physicians opinions. Byron v. Heckler, 742 F. 2d 1232, 1235 (10th Cir. 1984). "Unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician." Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982). The decision is void of any specific finding for disregarding the treating physician's opinion.

Therefore, since the exertional limitations of the claimant do not precisely match the criteria for performing a full range of sedentary work, the medical vocational guidelines cannot be applied to deny this claim. Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L. Ed. 2d 66 (1983).

The Railroad Retirement Board failed to follow its own regulations thereby applying its regulations in an arbitrary and capricious manner and should be reversed.

III. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT FOUND THAT THE RAILROAD RETIREMENT BOARD HAD NOT COMMITTED AN ERROR OF LAW IN FAILING TO CONSIDER ALL OF THE CLAIMANT'S NON-EXERTIONAL LIMITATIONS WHEN DETERMINING HIS RESIDUAL FUNCTIONAL CAPACITY.

The United States Court of Appeals for the Tenth Circuit has decided that the Railroad Retirement Board may disregard undisputed evidence of non-exertional limitations from the claimant's treating physicians without any specific finding to support its decision. That this finding is contrary to the appli-

cable decisions of the other Courts of appeal. "Failure to apply the correct legal standard or to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal." Smith v. Heckler, 707 F.2d 1284 (11th Cir. 1983); Smith v. Schweiker, 646 F.2d 1075 (5th Cir. 1981).

The claimant's treating physician, Dr. William Piechal, produced opinion evidence that the claimant was limited by various non-exertional limitations. Other than the evidence of pain he indicated that the claimant was limited by limitation of motion in shoulders, feeling in arms, right hand grip strength, fatigue which caused shaking of extremities, and environmental restrictions of heights caused by decreased balance, temperature extremes and vibrations. The Railroad Retirement Board did not make any specific findings or even apparently consider this evidence in rendering its decision.

"Unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician." Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982). "If the opinion of the claimant's physician is to be disregarded, specified, legitimate reasons for this action must be set forth." Murray v. Heckler, 722 F.2d 499 (9th Cir. 1983).

The failure of the Railroad Retirement Board to apply these two correct legal standards are grounds for reversal.

IV. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAILROAD RETIREMENT BOARD MAY USE THE MEDICAL VOCATIONAL GUIDELINES TO CONCLUSIVELY DECIDE A CLAIM WHEN THE CLAIMANT IS IMPAIRED BY CHRONIC PAIN.

The United States Court of Appeals for the Tenth Circuit has decided that the Railroad Retirement Board may use the medical vocational guidelines (grids) in cases where the

claimant suffers from chronic pain. This decision is contrary to the decisions of the sister Courts of Appeal and has created a conflict between the decisions of the Courts of Appeal. "Failure to apply the correct legal standards or to provide this court with a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal." Smith v. Heckler, 707 F.2d 1284 (11th Cir. 1983); Smith v. Schweiker, 646 F.2d 1075 (5th Cir. 1981).

In this case, the Railroad Retirement Board stated that "the hearings officer finds that while the Appellant does have low back and shoulder pain, his pain would not prevent him from performing sedentary work. The hearings officer has given consideration in the appellant's case to his testimony, medical treatment, daily activities, and the assessments of examining physicians." The medical evidence indicates that there is no doubt the claimant suffers from chronic pain.

The issue is whether the Railroad Retirement Board may determine that the non-exertional impairment of chronic pain is insignificant and may therefore rely conclusively on the medical vocational guidelines (grids). The Eighth Circuit Court of Appeals has held in Caperton v. Heckler, 733 F.2d 591 (1984) that chronic pain is a significant non-exertional impairment. "That when chronic pain exists, the medical vocational guidelines may not be used conclusively. If the Administrative Law Judge applies the medical vocational guidelines in such a case, he has committed reversible error".

The Tenth Circuit seems to overrule its own case of Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991). In Hargis, the Tenth Circuit states, "resort to the grids is particularly inappropriate when evaluating non-exertional limitations such as pain . . ." The Tenth Circuit seems to be condoning the arbitrary manner in which the Railroad Retirement Board applies the grids.

The claimant urges this Court to adopt the ruling of the Eighth Circuit Court of Appeals. Sedentary work, even the unskilled variety, requires the ability to use your hands to assemble small objects, to work at machines, etc. A claimant that suffers from chronic pain will have deficiencies in concentration and limitations of range of motion, as does this claimant. These limitations would affect one's ability to do sedentary work, as much as they would affect one's ability to do light or even medium work. Chronic pain will always be a significant limitation on one's ability to do certain types of jobs. No matter what the claimant's exertional residual functional capacity may be. In the event his Court allows the Railroad Retirement Board to determine that chronic pain is insignificant, to allow a conclusion to be stated that the chronic pain does not affect the claimant's ability to do a certain class of work, and then use the medical vocational guidelines to conclusively decide the case, the Railroad Retirement Board will be allowed to rebut the claimant's prima facie case by producing no evidence and using the grids when they actually do not fit. The use of vocational experts in chronic pain cases will disappear. The search for truth and justice will decline in this process. Inconsistent and arbitrary decisions will be the rule.

V. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DECIDED THAT THERE EXISTED SUBSTANTIAL EVIDENCE TO SUPPORT THE RAILROAD RETIREMENT BOARD'S FINDING THAT THE CLAIMANT'S ALLEGATIONS OF DISABLING PAIN WERE NOT CREDIBLE.

The United States Court of Appeals for the Tenth Circuit has reduced the substantial evidence standard to nothing more than requiring the Railroad Retirement board to draw certain conclusions in its decision. This decision is contrary to

the applicable decisions of this Court and of the sister Courts of Appeal.

This Court in Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, 95 L.Ed. 456, 71 S. Ct. 456, (1951) held "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The substantial evidence supports a finding that the claimant is disabled because of pain. Most of the Courts of Appeal have adopted manners to evaluate allegations of pain. Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987); Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986); Avery v. Secretary of Health & Human Services, 797 F.2d 19 (1st Cir. 1986); Landry v. Heckler, 782 F.2d 1551 (11th Cir. 1986); Foster v. Heckler, 780 F.2d 1125 (4th Cir. 1986); Green v. Schweiker, 749 F.2d 1066 (3rd Cir. 1984).

The evidence indicates that the claimant has an impairment of the spine. It had been diagnosed as chronic lumbar syndrome, spondylolysis with spondylolisthesis, lumber disc disease. That this condition had required a two level fusion in 1988. This is the type of impairment that is reasonably expected to produce some pain. The existence of this impairment is proven by objective medical evidence. This is undisputed. The claimant testifies of disabling pain. According to these cases, the Railroad Retirement Board must then examine all the evidence, both objective and subjective, to determine whether the pain is in fact disabling. In the instant case, the Railroad Retirement Board determines that the allegations of pain are not credible. This decision is not supported by substantial evidence.

The substantial evidence that the Railroad Retirement Board and the Tenth Circuit relied upon was selective statements from the medical records and testimony regarding the

claimant owning chickens and cattle. By affording such statements and reports and interpretation least favorable to the claimant, the Hearings Officer violated a fundamental prohibition long ago laid down by the Courts. Brand v. Secretary, 623 F.2d 523 (8th Cir. 1980); Benitez v. Califano, 573 F.2d 653 (9th Cir. 1978). First of all regarding the chicken and cattle, the claimant's actual testimony was:

> HEARINGS OFF: Alright. Do you have chickens on your farm?
>
> APPELLANT: My wife does.
>
> HEARINGS OFF: Do you do any work with those chickens at all?
>
> APPELLANT: Not now.
>
> HEARINGS OFF: When's the last time you did anything with those chickens?
>
> APPELLANT: Quite a while . . .
>
> HEARINGS OFF: (inaudible) experience with that. (laughs) Well, you can if you like.
>
> APPELLANT: It's . . . it's been a year or two years since I've done anything.
>
> HEARINGS OFF: Alright. You don't . . .
>
> APPELLANT: I maybe walk in and look at them, you know. Just go by and walk in and look at them.
>
> HEARINGS OFF: How many chickens do you folks have?
>
> APPELLANT: There's two houses, 20,000.
>
> HEARINGS OFF: So you have 20,000 chickens right now?
>
> APPELLANT: 40,000.
>
> HEARINGS OFF: You have 40,000, 20,000 for each house.

APPELLANT: Yes.

HEARINGS OFF: Okay. You don't do anything with those chickens?

APPELLANT: No Sir.

HEARINGS OFF: Alright. Two years ago, what were you doing with them?

APPELLANT; Uh . . .

HEARINGS OFF: What were your responsibilities?

APPELLANT: Right . . . right after I had my back surgery . . .

HEARINGS OFF: Right.

APPELLANT: . . . and . . and kind of got over it as well as I . . . as I could, I tried picking up the dead chickens and . . .and all that, and it kept bothering me. My legs would go numb again, so I just . . . primarily quit everything.

and in regard to the cattle, the testimony was:

HEARINGS OFF: Do you . . . do you perform any work on her farm?

APPELLANT: Uh . . .

HEARINGS OFF: or chores for her at all?

APPELLANT: Work, no. I . . . I have some cattle on there.

HEARINGS OFF: About how many head do you have?

APPELLANT: Well, a . . . another man and I have, I guess, a little over a hundred head right now.

HEARINGS OFF: This is on her farm?

APPELLANT: Yes.

HEARINGS OFF: Okay. And what type of . . . These aren't . . .These aren't . . . pardon me, I'm . . . no, no, these aren't dairy cows, right? These are . . . This is cattle.

APPELLANT: These are just yearling heifers.

HEARINGS OFF: Okay. and . . .

APPELLANT: We bought . . . bought for resale, trying to make some money.

HEARINGS OFF: Okay. What, if anything, do you do with those cows?

APPELLANT: Well, that's the reason I've got my partner, to take care of . . . of the . . . the labor part of it.

HEARINGS OFF: What do you do with it, if anything:

APPELLANT: Uh . . .

HEARINGS OFF: For instance, I noticed a report in there today that you . . . you one . . . at one point in '89, you dehorned 140 cattle, something like that. Do you still do that?

APPELLANT: No sir.

HEARINGS OFF: Alright. When . . . was 1989 the last time you did that?

APPELLANT: Yes, I've tried to do lots of things since my accident, since my surgery.

HEARINGS OFF: Alright.

APPELLANT: And, I don't know, after I spent so many days in bed on account of something I was stubborn enough to go ahead and decide I was gonna do, I decided that I was gonna end up back in the hospital if I didn't slack up. And that's what I finally done.

HEARINGS OFF: Do you feed the cattle?

APPELLANT: No.

HEARINGS OFF: Do you water cattle?

APPELLANT: No.

on examination conducted by claimant's attorney, the following testimony was elicited.

ATTORNEY: Was there a period just after the surgery when you feit better and were able to do more things?

APPELLANT: Well, after I got over the surgery part of it, I decided that I was just out of shape and what soreness and stuff I had was just lack of . . . not using muscles. And I worked at trying to . . . to do some different things. You know, I tried doing all I could.

ATTORNEY: Is this when you were dehorning the cattle and working more active in the chicken farm?

APPELLANT: Yes, that's when I decided all I needed to do was get tough and . . . like I'd always done. I always enjoyed work. And I know that may be kind of hard to believe for some people, but I did, even when I . . . when I was a kid. And when you can't do it, you miss it, when you get where you can't.

ATTORNEY: What period or what date did you decide that you weren't able to do this any longer? Was there some event that caused you to . . . realize that you were not able to do this?

APPELLANT: Well, That's . . . I . . . after I worked cattle and stuff, I . . . I got down, back in the bed.

ATTORNEY: When you say you got down, that means you were in the bed?

APPELLANT: Yes.

ATTORNEY: How long would you stay in bed?

APPELLANT: Well, for a week, ten days, you know. I would get up and move to the recliner, but as far as my activities, getting to go to the coffee shop or . . . or that kind of stuff was out, you know. And I took a lot more pain medication and . . . and all that. Then I'd get to where the pain medication wasn't doing me any good because I had to take too much of it.

ATTORNEY: How much activity did it take until you got to the situation where you would be in bed for a week

to ten days?

APPELLANT: Now or then?

ATTORNEY: Then.

APPELLANT: Well, it was . . . it was different. It . . . it depended on what I was doing. And like you're talking about working the cattle. See, I didn't work all these cattle. I was there, but uh . . . that was . . . my kids were there doing it, you know. But I felt like I was a part of it. At least I was able to be out there and I was telling them how to do it. But as, you know, far as doing the . . . the actual labor part of it or the up and down or bending and stooping, I wasn't doing . . . doing all of that. But I was there. That's . . . they . . . the whole (inaudible) and handed them stuff and done stuff like . . . hand them medicine, filled up the needles and . . . and stuff like that. And I gave some shots and then, like I say, I was down. And the only way to not help when you're around stuff like that is not to be there or you're just in the way. You just . . .

ATTORNEY: Were you out there for an hour or two hours or three hours?

APPELLANT: I was probably out there altogether two hours. I don't recall whether we took breaks in between there or not at that time. I don't even recall what the date was.

ATTORNEY: I believe it was in 1989?

APPELLANT: Oh, '89?

ATTORNEY: Do you remember how long you were down after you worked the cattle?

APPELLANT: Approximately a week. I've done that from . . . from walking too much at the chicken house, too, along about the same time. I'd go in and check those and . . . and . . . and walk around the house to see if, you know, water leaked or see if something was

wrong, you know. I'd check on it. The bending and stooping part of the chicken house would be to pick up the dead. And I had done that and . . . and I guess two years or . . . or better. (inaudible).

That testimony contained no substantial evidence to indicate the claimant's allegations of disabling pain were not credible.

The medical records relied upon by the Railroad Retirement Board may have been enough, if they were the only medical records in evidence. A complete review indicates that the Railroad Retirement Board took the only unfavorable statements it could find from the entire record and relied solely upon them. A cursory review of some of the other medical findings are as follows. On January 20, 1986, Paul L. Raby, M.D., stated the Petitioner was in "severe pain -- no improvement with medication." On March 6, 1986, Dr. Raby prescribed a TENS Unit for the pain. On April 18, 1986, Dr. Raby states "The neurological examination shows there is some pain . . ." On May 5, 1986, Dr. Raby's notes indicates the claimant is in "severe pain." On September 14, 1987, R.L. Winters, M.D., a treating physician, stated "He does have occasional pain that runs down the back of the leg on the right, posteriorly at times. I do think he has severe chronic back pain, I am sure he does." On March 14, 1988, Dr. Winters stated, "Ray has chronic back pain in his lower back and it does keep him from sleeping a lot at night." On November 22, 1988, Dr. Winters states "his back is still giving him a lot of pain. He's got numbness of his right leg now. He's been back to see Dr. Raby, and he sent him to Dr. Martinbeau for a second opinion. They feel like because of the chronicity and severity of the pain he's had they should go ahead and do a fusion on his L4-5 with putting a plate in there maybe a bone graft too. I know Ray is still having a lot of pain." On July 7, 1989, William S. Piechal, D.O., a treating physician, found "several areas of point tenderness over the right sacroiliac area as well as the right paragluteral area which radiated into the right hip." On November 27, 1989, Dr. Piechal found "acute muscle spasm experienced in the mid thoracic area."

The claimant's testimony regarding the pain he suffers is consistent with the medical findings. He has worn a TENS unit, had back surgery, wore back braces, physical therapy, taken numerous pain medications. He is unable to perform various daily activities, to perform past hobbies. He has seen a physician monthly since the injury. He has been diagnosed with episodes of depression. He is unable to sleep.

The decision of the Railroad Retirement Board that the claimant's pain is not disabling must be nothing more than mere conclusion. It is not supported by substantial evidence. "Evidence is not substantial if it is overwhelmed by other evidence -- particularly certain types of evidence (e.g., that offered by treating physicians) or if it really constitutes not evidence but mere conclusion." Kent v. Schweiker, 710 F.2d 110, 114 (3rd Cir. 1983). The evidence relied upon by the Railroad Retirement Board, as stated in its decision, is overwhelmed by the other evidence. Its decision should be reversed.

VI. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE STANDARD FOR REVIEW IN A RAILROAD RETIREMENT BOARD APPEAL WAS THAT THE RECORD MUST COMPEL THE HEARINGS OFFICER TO DETERMINE THE CLAIMANT WAS DISABLED.

The United States Court of appeals for the Tenth Circuit has decided to change the standard of review in Railroad Retirement Board disability annuity cases. That this new standard is contrary to the applicable decisions of this Court and of the sister Courts of Appeal. It has long been the standard of review in this Court and other Courts of Appeal that judicial review of a determination that a claimant is not disabled is limited to determining whether the record contains substantial evidence to support the denial decision and whether correct legal standards were applied. Universal Camera Corporation

v. National Labor Relations Board, 340 U.S. 474 (1951); Richardson v. Perales, 402 U.S. 389, 91 S. Ct. 1420, 28 L.Ed. 2d 842 (1971); Thomas v. Sullivan, 876 F.2d 666 (8th Cir. 1989); Smith v. Heckler, 707 F.2d 1284 (11th Cir. 1983); Smith v. Schweiker, 646 F.2d 1075 (5th Cir. 1981); Walker v. Mathews, 546 F.3rd 814 (9th Cir. 1976).

In the instant case, the Tenth Circuit using I.N.S. v. Elias-Zacarias, 502 U.S. _____, 117 L.Ed 2d 38, 112 S. Ct. 812 (1992) decides that before an appellate court can reverse a not disabled determination by the Railroad Retirement Board, the record must compel a finding of disability.

There are numerous standards within the administrative process for disability claims that I would urge this Court to modify, one of them is not to create a more stringent standard of appeal for the claimants. On many claims, the first time a claimant is provided with a fair and impartial hearing on his/her claim is before the Circuit Court of Appeals. I urge this Court not to adopt this standard of review in Railroad Retirement Board and Social Security Administration disability cases.

CONCLUSION

For each of the foregoing reasons, the Order and Judgment of the United States Court of Appeals, Tenth Circuit should be reversed.

Respectfully submitted;

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BY: _____
JONATHAN K. SULLIVAN

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WESLEY R. HAMMONS,
Petitioner,
v.
U.S. RAILROAD RETIREMENT BOARD,
Respondent.

No. 93-9524
(Agency No. A-429-08-3301)

ORDER AND JUDGMENT*

Before LOGAN and MOORE, Circuit Judges, and McWILLIAMS, Senior Circuit Judge.

The parties to this appeal have indicated that oral argument is not desired. After examining the briefs and the appellate record, this three-judge panel has determined that oral argument would not materially assist the determination of this appeal. The cause is therefore ordered submitted without oral argument. See Fed. R. app. P. 34(a); 10th Cir. R. 34.1.9.

On January 25, 1990, Wesley R. Hammons filed with the Railroad Retirement Board an application for a disability annuity under the Railroad Retirement Act, alleging that he was disabled from performing any regular work beginning January 2, 1986, due to a back injury sustained during the course of his

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

employment with Burlington Northern Railroad. [1]. 45 U.S.C. § 231a and 20 C.F.R. § 220.

Hammons' application for a disability annuity was administratively denied, whereupon he requested a hearing, which was held before Hearings Officer Scott Kuhlmey on July 15, 1991, in Oklahoma City, Oklahoma. Hammons was represented by counsel at this hearing, and he testified at length concerning his physical condition and the pain attendant thereto. Hammons testified that he had not been regularly employed since leaving Burlington Northern Railway on January 2, 1986. He also testified that for some time he had lived on a farm and raised chickens, some 40,000 of them, and managed 100 head of cattle. However, he added that he presently did none of the physical labor involved in raising the chickens or running the cattle, which work, he said, was done by his partner. In addition, the administrative record, consisting of numerous medical and vocational reports, was also before the Hearings Officer.

By a decision dated November 29, 1991, the Hearings Officer denied Hammons' application for benefits, holding that although Hammons' impairments did prevent him from returning to his prior employment with the railroad company, he still had the residual functional capacity to perform other jobs involving sedentary work which were available in the national economy. On review, the Railroad Retirement Board ("the Board") "affirmed and adopted" the decision of the Hearings

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[1] In his application, Hammons stated that he was born June 22, 1952, and that he was a high school graduate. He stated that he began working for Burlington Northern Railroad in July, 1970. While working as a switchman for Burlington Northern Railroad he stated that he injured his back on December 30, 1985, when he was hit by a boxcar door which caused him to hit a steel post. Because of the injuries sustained in this accident, Hammons ceased working for Burlington Northern Railroad on January 2, 1986. Hammons was initially diagnosed as suffering from an acute herniated lumbar disc, but, after further testing, the diagnosis was changed to acute lumbar strain over a preexisting spondylolisthesis.

Officer. Hammons then filed in this court a petition for review of the Board's decision. 45 U.S.C. § 355 (f).

The law is well settled that a decision of the Board regarding entitlement to benefits under the Railroad Retirement Act is not to be set aside on judicial review if it is supported by substantial evidence on the record and is not based on an error in law. *Aspros v. United States R.R. Retirement Bd.*, 904 F.2d 384, 386 (7th Cir. 1990); *Andrews v. R.R. Retirement Bd.*, 595 F.2d 676, 681 (D.C. Cir. 1978).[2] In this same general connection, we spoke in *Utah Copper Co. v. R.R. Retirement Bd.*, 129 F.2d 358, 361 (10th Cir. 1942) as follows:

> We conclude that as to all matters confided to the Railroad Retirement Board for administration, its judgments are final and conclusive if supported by substantial evidence and if free from arbitrary or capricious conduct. To hold otherwise would, in effect, be making of the Board a mere master to take the testimony and make recommendations of proposed findings of fact and conclusions of law.

As indicated, the Board "affirmed and adopted" the decision of the Hearings Officer, without further elaboration, so, although technically we are reviewing the Board's decision, in reality we are reviewing the decision of the Hearings Officer. The decision of the Hearings Officer was in considerable detail and comprised eleven typewritten pages, single-spaced. Our study of the record before the Hearings Officer leads us to conclude that the findings of the Hearings Officer are supported by substantial evidence and that the Hearings Officer committed no error in law. On that basis, we affirm the Board's decision.

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[2] 45 U.S.C. § 355 (f) provides that "[t]he findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive."

45 U.S.C. § 231a (a) (1) (v) provides for the payment of a disability annuity under the Railroad Retirement Act to "individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment." In this regard, 20 C.F.R. § 220.26 provides as follows:

> An employee . . . is disabled for any regular employment if he or she is unable to do any substantial gainful activity because of a medically determinable physical or mental impairment which meets the duration requirement defined in § 220.28 . . . To meet this definition of disability, a claimant must have a severe impairment, which makes him or her unable to do any previous work or other substantial gainful activity which exists in the national economy. To determine whether a claimant is able to do any other work, the Board considers a claimant's residual functional capacity, age, education and work experience (emphasis added).

20 C.F.R. § 220.100 sets forth the steps to be followed in determining the question of disability, or no disability, of one claiming a disability annuity under the Railway Retirement Act. Those steps, in essence, are as follows:

> 1. A claimant who is working and engaging in substantial gainful activity will be found to be not disabled regardless of his or her impairments, age, education or work experience.
>
> 2. A claimant who does not have a severe impairment will be found to be not disabled without consideration of age, education, or work experience. A severe impairment is one that significantly limits the claimant's physical or mental abilities to do basic work activities.
>
> 3. If a claimant is not working and has a severe impairment which meets or equals a listed impairment in Appendix 1 of the Board's disability regulations, a

finding of disabled will be made without consideration of the claimant's age, education, or work experience. 4. If the claimant's impairment is severe but still does not meet or equal a listed impairment, the Board will review the claimant's residual functional capacity, and if a claimant is nonetheless capable of performing work he or she has done in the past, a finding of not disabled shall be made. To make this determination, a review is made of the claimant's residual functional capacity and the physical and mental demands of his or her past work.

5. If a claimant is unable to do his past relevant work because of his or her impairments, the claimant's residual functional capacity and age, education, and work experience will then be reviewed to determine whether the claimant can do other work that exists in the national economy.

In the instant case, the Hearings Officer found that Hammons was not then employed in substantial gainful employment and that he did have a severe impairment which prevented him from performing his past railroad job. The Hearings Officer further found that Hammons' severe impairment did not meet or equal a "listed impairment," and that, considering his age (40 years of age), education (high school education) and the evidence concerning Hammons' physical strength, as well as the evidence concerning pain, Hammons did have the residual functional capacity to do sedentary jobs which were available in the economy.[3]

[3] Pursuant to 20 C.F.R. § 220.35, in addition to its authority to decide whether a claimant is entitled to a disability annuity under the Railroad Retirement Act, the Board is also authorized to decide, in certain cases, whether a claimant is disabled as that term is defined in the Social Security Act. Accordingly, courts have held that the standards for determining whether a claimant is entitled to a disability annuity under the Railroad Retirement Act are the same as for determining disability under the Social Security Act. See *Aspros v. United States R.R. Retirement Bd.*, 904 F.2d 384, 286 (7th Cir. 1990) and *Burleson v. United States R.R. Retirement Bd.*, 711 F.2d 861, 862 (8th Cir. 1983). In *Burleson*, the Eighth Circuit stated that "it is accepted practice to use social security cases as precedent for railroad retirement cases."

Hammons' basic position in this court is that the Hearings Officer did not properly assess the evidence as it pertained to Hammons' pain. Hammons did testify in detail concerning his pain problem. However, medical reports before the Hearings Officer permitted the inference that Hammons was overstating his pain problem. In connection with Hammons' pain and the extent thereof, the Hearings Officer spoke as follows:

> The hearings officer finds that the appellant would not be able to perform his work as switchman or footboard yardmaster as that work required lifting of over 75 pounds.
>
> Since the hearings officer finds that the appellant's impairments preclude his return to past work as he performed it, the burden of proof shifts to the Board to establish that there is other substantial gainful work which exists in the national economy which the appellant can perform, considering the affect of his impairments, and his age, education, and work experience.
>
> The hearings officer has given consideration in the appellant's case to his testimony, medical treatment, daily activities, and the assessments of examining physician.
>
> The issues in the appellant's case is the extent of his pain. The appellant testified to pain in the lower back and legs and in the shoulders which he states prevents him from performing any work. The hearings officer does not find the restrictions testified to by the appellant to be credible.
>
> The hearings officer finds that while the appellant does have low back and shoulder pain, his pain would not prevent him from performing sedentary work. The hearings officer has given consideration in the appellant's case to his testimony, medical treatment, daily activities, and the assessments of examining physicians.

In our view, the record supports the Hearings Officer's finding that, though Hammons did experience some pain, his pain did not prevent him from doing sedentary work.[4] As a result, the Hearings Officer did not err in resorting to the medical-vocational guideline as set forth in 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 1, Rule 201.23, which provides that someone of Hammons' age, education and previous work experience is "not disabled" when he can still perform sedentary work. Automatic application of the medical-vocational "grids" is appropriate when a claimant's residual functional capacity, age, education and work experience precisely match a grids category and there is no so-called non-exertional limitation, such as pain, which further affects an individual's capacity to work. Further, to be "disabled" requires more than mere inability to work without any pain, and that to be "disabling" the pain must be so severe that either by itself, or in conjunction with the impairments, it precludes any substantial gainful employment. *Gossett v. Bowman,* 862 F.2d 802, 806-.07 (10th Cir. 1988). In the instant case, the Hearings Officer found, in effect, that Hammons had no such non-exertional limitation.

This case is different from *Thompson v. Sullivan,* 987 F.2d 1482, 1492 (10th Cir. 1993) where we said that because there was evidence of a non-exertional limitation, namely pain, such precluded the Secretary from relying "conclusively" on the medical-vocational grids. In this connection, it should be noted that in *Channel v. Heckler,* 747 F.2d 577, 582, n.6 (10th Cir. 1984), we stated that the "mere presence" of a non-exertional impairment did not automatically preclude reliance on the grids, and use of the grids would be foreclosed only to the extent that the non-exertional impairment further limited the range of jobs available to the claimant. The present case

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[4] Sedentary work is defined in 20 C.F.R. § 404.1567(a). In finding that Hammons could, despite his exertional impairments, perform sedentary work, the Hearings Officer relied on the medical reports of Drs. Raby and Winters.

is not one where the Hearings Officer ignored or refused to consider Hammons' testimony concerning pain. Rather, the Hearings Officer took into consideration Hammons' testimony concerning pain, along with all the other evidence before him, and simply found that Hammons' pain was not a significant non-exertional impairment.

In sum, the state of the record before the Hearings Officer did not compel the Hearings Officer to find that Hammons was entitled to a disability annuity under the Railroad Retirement Act.[5] Rather, the record permits, and therefore supports, the finding of the Hearings Officer that Hammons had the residual functional capacity to perform sedentary work and accordingly was not entitled to a disability annuity.

The Board's decision is affirmed.

Entered for the Court,

Robert H. McWilliams
Senior Circuit Judge

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[5] In *I.N.S. v. Elias-Zacarias*, ____U.S. ____, 112 S. Ct. 812, 815, n.1 (1992), the Supreme Court held that in order to reverse a finding by the Board of Immigration Appeals, that an alien was not entitled to asylum or a withholding of deportation, the reviewing court must find that the evidence not only supports a conclusion that the alien is entitled to asylum or a withholding of deportation, but compels such a finding. Such supports our conclusion that the record before the Hearings Officer did not compel a finding in favor of Hammons. The record might well have permitted such, but did not compel it.

APPENDIX B

RAILROAD RETIREMENT BOARD

Appeal of Wesley R. Hammons R.R.B. No. A-429-08-3301	Railroad Retirement Act Claims Appeal Docket No. 4058

The Board has reviewed the record in the appeal of Mr. Wesley R. Hammons from the decision of the hearings officer and has considered the argument and evidence contained therein. The Board affirms and adopts the decision of the hearings officer.

The appeal is denied.

Glen L. Bower

C.J. Chamberlain

Andrew F. Reardon

DECISION OF THE HEARINGS OFFICER

Mr. Wesley R. Hammons
Post Office Box 337
Wister, Oklahoma 74966-0337

Decision No. 92-108
Appeal No. 91-496
R.R.B. No. A-429-08-3301

PROCEDURAL HISTORY

This is an appeal from the denial of a disability annuity under Section 2(a) (1) (v) of the Railroad Retirement Act.

On January 25, 1990 the appellant filed an application for a disability annuity in which he alleged disability from January 2, 1986 due to having back surgery, fusing the L4 and L5 vertebras of the spine due to an accident of December 1985. His application was denied on October 22, 1990 and upon his request for reconsideration, the Bureau of Disability and Medicare Operations upheld its decision on February 13, 1991. The appellant filed a timely appeal on March 8, 1991. A hearing was held in Oklahoma City, Oklahoma on July 15, 1991 at which the appellant appeared with his wife and his attorney, Mr. Jonathan K. Sullivan. Time was granted after the hearing to furnish additional evidence which was received on August 14 and 19, 1991.

ISSUE

The general issue in the appellant's case is whether he is entitled to a disability annuity under section 2(a) (1) (v) of the Railroad Retirement Act. The specific issue is whether the appellant has a permanent mental or physical impairment of such severity that he is not only unable to do his past relevant work but is unable to engage in any other regular employment considering his age, education, and previous work experience.

LAW AND REGULATIONS

Section 2(a) (1) (v) of the Railroad Retirement Act provides annuities for "individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment."

The regulations of the Railroad Retirement Board (Board) on disability evaluation are set out in 56 Fed. Reg. 12,978 (1991) (to be codified at 20 C.F.R. Part 220). These regulations, in many regards, parallel the disability regulations of the Social Security Administration. This is because federal courts have held that "regular employment" as that term is used in the Railroad Retirement Act has the same meaning as the term "substantial gainful activity" as that term is used in the Social Security Act. Section 220.26 of the Board's regulations explains that to be found disabled for any regular employment, "a claimant must have a severe impairment, which makes him or her unable to do any previous work or other substantial gainful activity which exists in the national economy. To determine whether a claimant is able to do any other work, the Board considers a claimant's residual functional capacity, age, education and work experience." Residual functional capacity means what the claimant can do despite the limitations caused by his or her impairments.

The Railroad Retirement Board's regulations at section 220.100 provide the following steps for evaluating disability:

1. A claimant who is working and engaging in substantial gainful activity will be found to be not disabled regardless of medical findings.
2. A claimant who does not have a severe impairment will be found to be not disabled. A severe impairment is one that significantly limits the claimant's physical or mental abilities to do basic work activities.
3. If a claimant is not working and has a severe impairment which meets or equals a listed impairment in Appendix 1 of the Board's disability regulations, a finding of disabled will be made without consideration of the claimant's age, education, or work experience.
4. If a claimant is capable of performing work he or she

has done in the past, a finding of not disabled must be made. To make this determination, a review is made of the claimant's residual functional capacity and the physical and mental demands of his or her past work.

5. If a claimant is unable to do his past relevant work because of his or her impairments, the claimant's residual functional capacity and age, education, and work experience will be reviewed to determine whether the claimant can do other work that exists in the national economy.

SUMMARY AND EVALUATION FOR THE EVIDENCE

The appellant was born on June 22, 1952 and is now 39 years old. He has a high school education.

The appellant testified that from July 1971 to January 1986 while in the railroad industry he worked as a switchman, brakeman, and footboard yardmaster. He stated he worked as a brakeman for only a very few days. From 1975 to January 1986 he stated that 50 percent of the time he worked as a footboard yardmaster using tools as a lantern, radio and pencil, which he used to make a yard list and complete time slips for himself and his crew. As a footboard yardmaster, he stated he was charged with the responsibility of making up trains and placing cars in the right industry. In an eight hour workday he stated he would stand or walk for six hours, very frequently bending and stooping and frequently climbing and lifting well over 100 pounds. The other 50 percent of the time the appellant stated he worked as a switchman. As a switchman he stated he used a lantern and radio and occasionally completed an accident report. In an eight hour workday he stated he would stand or walk at least six hours a day. Hundreds of times he stated he would bend and stoop and frequently climb and lift well over 100 pounds.

The appellant stated he has a chicken farm with over 40,000 chickens. He stated he also owns over 100 head of

cattle. He stated that in 1989 he tried to do lots of things which included dehorning cattle. Today, he stated that his partner takes care of the labor. The appellant stated he will not even feed or water the cattle, only drive down to check them, to see if they're sick and if so to get somebody to help. With respect to the chickens, he stated it has been a year or two since he has done anything with them and that today he will only walk in and look at them. He stated that if he tries picking up dead chickens his legs will go numb. Therefore he stated he primarily has quit everything.

The appellant stated that in December 1985 he had numbness in the low back from L3 to L4 which went into his legs. He stated the more active he was the more the numbness went into his legs. He stated he would have a constant ache in his low back. He stated that if he walked too far his right leg would collapse, though it wouldn't hurt he said the leg will feel as if it belonged to someone else. He stated he also had numbness in the back of the left leg which went down to his knee.

The appellant stated that today he has constant pain all down the center of each side of his backbone, from the middle of the back down to the tailbone. He stated that at the site of the surgery there was some numbness and that over the course of a day the pain will get better and also get worse. He stated that his back will become aggravated just by sitting and that shaving will just kill his back. At least three times a week he stated he will have muscle spasms in the back.

The appellant testified to pain in the hips. With the right hip he stated had pain with a constant dull aching feeling in the top part of the hip and that a little further down the leg constantly itches and then a little lower the leg constantly burns as if a cigarette is stuck to it. He stated the hip will become a lot worse if he walks too much (100 yards) or sits too much. He stated he sleeps a lot in his recliner. He stated he has numbness from the hip to the knee in the right leg.

The appellant testified to having bursitis with constant aching pain in the upper part of the right shoulder from the neck down. Sometimes he stated the pain will be real severe. He said he had weakness in his shoulders and that the deltoid muscle in the right arm had deteriorated. The appellant also testified to constant left shoulder pain though it was not as severe as his right shoulder. He stated he is never free of pain.

In the year prior to the hearing the appellant stated he had seen W.S. Piechal, M.D., 12 to 14 times. He stated he informed the physician of the aching in his back, numbness in the right hip, aching in the shoulders and neck trouble. For relief the appellant stated he has taken occasional shots in the back and shoulders and it has eased the pain for four to five days. However taking the shots he said got to be very painful so he stopped. In July, 1991 the appellant stated he began to take Darvocet but it made him sick to his stomach so he terminated the medication after three days. In its place and even prior to July 1991, the appellant testified to taking Tylenol with codeine, two tablets at a time, twice a day. He stated he had begun taking Tylenol prior to his surgery in December, 1988. At one time he stated he would take 14 to 16 tablets of Tylenol a day but with little relief. For the last two years he stated he backed off and he had been taking four a day. He stated Tylenol will ease the pain a little but nothing stops it. He stated the Tylenol does more for his shoulders than for his back. He testified to applying Myoflex cream to his low back, hips and shoulders about every night. The appellant stated he attempted physical therapy in 1990 for two or three days, but the more exercise he performed the more he experienced numbness. Walking, he stated will cause numbness. The appellant testified to also taking Halcion for over two years at night to help him sleep. Sometimes he stated he will take two tablets instead of one. He stated he used to wear a Tens unit but it did not give him relief.

In describing his daily activities the appellant stated he will arise at 4:30 A.M. and sit in his recliner watching television.

About 7:00 A.M. he stated he will go down to a restaurant, visit and return home between 7:30 and 8:00 A.M. He stated he will sit around the house, get bored and probably end up going back to the restaurant at 10:00 A.M. He stated he will return home around 10:30 or 11:00 A.M., and at about 12:00 noon, eat. In the afternoon he stated he will go and look at his cattle, look at the chickens and perhaps drive around. After dinner in the evening he stated he will watch television. He stated he could sit ten days if he had to, or an hour, stand for 20 minutes and walk ten minutes at the most though he would have to pay with a week in bed.

In 1972 the appellant was in a car accident and on June 8, 1973, J.W. Wideman, M.D., stated the appellant's injuries included bilateral clavicle fractures, right sided brachial plexus, pulmonary contusion with pulmonary thorax and multiple rib fractures. He stated the appellant was left with right upper extremity sensory and motor deficit.

The appellant was hospitalized on January 20, 1986. Hospital reports stated the appellant was injured on December 30, 1985 and stopped working January 7, 1986. Examination showed the upper extremities to be completely normal. Cervical and thoracic spines were reported normal. The appellant had muscle spasm at L2 and S1 bilaterally. The appellant was able to walk on his toes but had a bit of weakness in the right leg walking on his heels. The deep tendon reflexes were present and normal and sensation showed a slight reduction in the dermatone of L5 in the right leg and some weakness of the tibialis anterior tendon in the right foot. The straight leg raising test was negative for pain in the legs but gave him pain in the back.

On February 13, 1986, P.L. Raby, M.D., a treating physician, stated that neurological examination remained completely normal and the diagnosis was acute lumbar strain over a preexisting spondylolisthesis. On March 28, 1986 he stated a bone scan was completely normal. On April 18, 1986 he stated the appellant reported no improvement of his back

condition, even with a lumber brace and a tens unit. He stated neurological examination showed some pain in the right lumbar area at L5-S1 and over the right buttock. He stated the appellant could walk on his toes and heels and forward flexion of the back showed very slight reduction of motion.

In May 1986 the appellant underwent surgery for a cystoscopy, sigmoidoscopy and intravenous pyelogram.

On June 13, 1986 P.L. Raby, M.D., stated that the appellant reported not having any more pain except when lifting, stooping or bending forward, with numbness over the right greater trochanter but other than that the appellant was doing well. The diagnosis he stated, remained a chronic lumbar sprain with spondylolysis, spondylolisthesis, grade I of L5-S1.

On June 25, 1986, a consulting physician, W.A. Knubley, M.D., stated the appellant's strength was good bilaterally in the lower extremities with no obvious weakness in the distal foot region. He reported hip and knee strength to be good and reflexes bilaterally symmetric. He stated sensory examination showed questionably decreased sensation in the dorsum of the right foot, suspicious for a superficial peroneal nerve, but it did not appear to be radicular in pattern. Sensory examination in the hip region he stated revealed a circular area in the lateral femoral cutaneous region on the hip of decreased sensation, with a similar area but not so prominent seen on the left side. Evaluation of the back he said showed normal straight leg raising except for some low back discomfort without radiation. The lower extremities showed he said, good pulses bilaterally.

The treating physician P.L. Raby, M.D., stated on August 12, 1986 that the appellant reported doing a lot better but still had episodes of acute low back pain which lasts two to three days and goes away. He stated the appellant wore a back brace. The physician stated that deep tendon reflexes of the lower extremities and straight leg raising was negative and there was no neurological deficit of the lower extremities. He stated the appellant needed vocational rehabilitation and should be oriented toward a trade where he did not have to do

any long standing, no stooping, lifting, or forward bending. On March 19, 1987 he stated the diagnosis remained spondylolysis, spondylolisthesis at the level of L5-S1 and a chronic back syndrome. He stated if the appellant was offered light work adapted to his actual condition he would be able to go back to work at anytime. He stated deep tendon reflexes, sensation and straight leg raising of both lower extremities were normal. He stated forward flexion was limited as the appellant was able to bring his fingers about one foot from the floor. On April 30, 1987 he stated the appellant reported he had intermittent pain in the low back that goes into both buttocks and also intermittent pain in the right thigh. Neurological examination he reported was normal. He stated the appellant would continue with Tylenol and Halcion. On August 7, 1987 he stated the appellant had full range of motion of the lumbar spine and the lower extremities were normal. He reported no neurological deficit. On October 14, 1986, Dr. Raby reported that examination showed the deep tendon reflexes of the lower extremities were normal and the straight leg raising was negative. He stated there were no neurological deficits in the lower extremities. Dr. Raby stated the appellant's diagnosis was spondylolysis, spondylolisthesis, grade I at the level of L5-S1 and chronic lumbar syndrome. He stated the appellant had to be oriented toward a light type of work. On September 6, 1988, he reported the appellant received a lumbar epidural injection. On September 20, 1988 he then stated that it was now his suggestion that the appellant have fusion of the lumbar spine at L4-5, and S1. On December 15, 1988 the appellant underwent spinal fusion performed by Dr. Raby. On January 9, 1989 Dr. Raby reported that the appellant had no more pain in the lower extremities and that X-rays of the lower spine showed the plates and screws to be in good position and the appellant was building up some bone and the bone graft was getting more dense bilaterally at the level of L4, L5 and S1.

A treating physician, W.S. Piechal, D.O., stated on July 12, 1989 that upon examination, deep tendon reflexes of the lower extremities were 2+ and equal, though back motion was

limited. He stated muscle testing revealed no focal deficits, in general in the 4+/5 range and that sensory testing was also benign. Straight leg raising tests he said were essentially negative to 80 degrees on the left and approximately 70 degrees on the right with no obvious atrophy, wasting or fasiculations. He stated that the appellant reported that if the appellant paces himself he can perform most activities necessary to maintain his chicken farm. On August 9, 1989 the physician stated that the appellant's physical examination was essentially unchanged and that he was injected with Marcaine and Depo-Medrol. On October 18, 1989 he reported the appellant stated he was able to brand and dehorn 140 head of cattle which caused increased back pain but he was able to pace himself and successfully complete the job. The physician reported that physical examination showed deep tendon reflexes were 2+ and equal, straight leg raises essentially negative and the appellant had a normal gait pattern. On December 6, 1989 he stated the appellant had chronic low back pain with recent pain in the parascapular area. He had an injection of Marcaine and Depo-Medrol bilaterally in the occipital area and in the right scapular area.

On January 12, 1990 the appellant underwent surgery for acute and chronic sigmoid diverticulitis.

On February 8, 1990, R.L. Winters, M.D., stated the appellant had been under his care for many years. In 1972 the appellant, he said, had been in a car wreck, suffering 12 fractured ribs, both clavicles fractured, sternum fractured and a lung punctured. In 1983 he stated the appellant had an appendectomy. In 1988 he stated the appellant underwent back surgery, continued to see Dr. W. Piechal, a back pain specialist, and requires a Tens Unit and pain medication. In December 1989 he stated the appellant underwent a partial colectomy. He stated that due to the auto accident the appellant had weakness of the right deltoid muscle with definite atrophy when compared to the left. He stated the appellant can walk fairly well and has no ankylosis. He stated the appellant's

reflexes were active and equal and indicated that the appellant's neurological system was normal.

On April 16, 1990 the appellant was examined by an independent consultant, R.L. Hendricks, M.D., who stated that the appellant's medications included Tylenol #3, two to four tablets a day and Halcion. He stated the appellant had a right leg limp with limited range of back motion. The appellant, he said walked on his heels and toes well. Sciatic stretch tests he stated were mildly positive but primarily because of hamstring tightness not really radiculopathy. Over the right medial leg he stated the appellant had sensory deficit, though ankle and knee jerks were symmetrical. He stated the appellant had no subjective motor weakness. X-rays he stated showed the appellant had a back fusion, though he was not certain if it was solid and he concluded the appellant could not return to his job in the railroad.

Another consulting physician, J.S. Millar, M.D., stated on August 29, 1990 that reflexes of the biceps, triceps, patellar and ankle points were 2+ and symmetric. The extremities he stated showed no evidence of clubbing, cyanosis or edema and no muscle weakness or wasting. He stated the appellant had limited back motion.

On August 14, 1991, W.S. Piechal, D.O., completed a medical assessment form stating the appellant could lift a maximum of 25 pounds to waist level and frequently ten pounds or less to waist level. He stated that in an eight hour workday the appellant could stand and walk two to three hours and sit for four to five hours.

The hearings officer finds that the appellant's impairments, looked at singly or in combination, do not meet or equal any listed impairment in the Railroad Retirement Board's Listing of Impairments. His impairments do cause restrictions and the issues remain as to whether he has the capacity to return to his former work and if not whether he can perform other work which exists in the national economy.

The hearings officer finds that the appellant would not be

able to perform his work as switchman or footboard yardmaster as that work required lifting of over 75 pounds.

Since the hearings officer finds that the appellant's impairments preclude his return to past work as he performed it, the burden of proof shifts to the Board to establish that there is other substantial gainful work which exists in the national economy which the appellant can perform, considering the affect of his impairments, and his age, education, and work experience.

The hearings officer has given consideration in the appellant's case to his testimony, medical treatment, daily activities, and the assessments of examining physician.

The issues in the appellant's case is the extent of his pain. The appellant testified to pain in the lower back and legs and in the shoulders which he states prevents him from performing any work. The hearings officer does not find the restrictions testified to by the appellant to be credible.

The hearings officer finds that while the appellant does have low back and shoulder pain, his pain would not prevent him from performing sedentary work. The hearings officer has given consideration in the appellant's case to his testimony, medical treatment, daily activities, and the assessments of examining physicians.

The appellant testified to constant pain all down the center of each side of his backbone from the middle of the back down to the tailbone, with pain in the hips, a constant dull aching pain in the top part of the right hip, with itching, burning, and numbness. Prior to the appellant's surgery in December 1988, the treating physician and surgeon, P.L. Raby, M.D., stated repeatedly that the appellant had no neurological deficits of the lower extremities, that straight leg raising tests were normal as were his reflexes. The physician concluded that the appellant be oriented toward a lighter type of work. A consulting physician (W.A. Knumbley, M.D.), stated that the appellant's strength was good bilaterally in the lower extremities, hip and knee strength was good and reflexes were normal bilaterally. After

the December 1988 surgery, in February 1990 another treating physician, (R.L. Winters, M.D.) stated the appellant could walk fairly well and had no ankylosis. He stated the appellant's reflexes were active and equal and indicated that the appellant's neurological system was normal. In addition, in April 1990, an independent consultant (R.L. Hendricks, M.D.) stated the appellant walked on his heels and toes well, that ankle and knee jerks were symmetrical and that there was no subjective motor weakness. He stated that though sciatic stretch tests were mildly positive, this was due primarily because of hamstring tightness, not really radiculopathy. The new treating physician (W.S. Piechal, D.O.) found the appellant to have no neurological deficits, stating that deep tendon reflexes were normal, straight leg raising tests negative, no evidence or atrophy, wasting, or fasiculations and reported that the appellant has exhibited a normal gait. He concluded in August 1991, that the appellant could frequently lift ten pounds, stand and walk for two to three hours and sit four to five hours in an eight hour workday consistent with sedentary work.

With respect to the upper extremities, a treating physician, R.L. Winters, M.D., stated that the appellant had definite weakness of the right deltoid with definite atrophy. However, an independent consultant, (J.S. Millar, M D.), in August 1990 stated reflexes of the biceps and triceps were normal. Further, another treating physician (Piechal) stated the appellant could lift ten pounds, again consistent with sedentary work. There is no evidence of a major impairment of the left shoulder.

The appellant is 39 years old with a high school education. The hearings officer finds that the appellant has the residual functional capacity to perform the full range of sedentary work as described in Rule 201.22 of the Railroad Retirement Board's Regulations.

Sedentary work involves lifting no more than ten pounds. Although a sedentary job is defined as one which involves sitting, a certain amount of standing and walking is often necessary in carrying out job duties. Railroad Retirement Regulations have identified 200 separate unskilled sedentary

occupations, each representing numerous jobs in the national economy. These jobs may be performed after a short demonstration or within 30 days.

The hearings officer finds after reviewing the evidence of record, including the testimony at the hearing, that the appellant, a younger individual, with a high school education, has the capability to perform the full range of sedentary work, and that there exists in the national economy significant numbers of jobs which the appellant considering his impairments, age, education, and work experience can perform.

FINDINGS

1. The appellant meets the service requirements for a disability annuity under Section 2(a) (1) (v) of the Railroad Retirement Act.
2. The appellant is not currently working or engaging in substantial gainful activity.
3. The appellant's impairments, do not meet or equal in combination any impairment listed in Section 220.187, Appendix 1 of the Railroad Retirement Board's Regulations.
4. The appellant is a younger individual with a high school education.
5. The appellant retains the residual functional capacity for sedentary work.
6. In spite of the restrictions testified to by the appellant because of his impairments, there are significant numbers of jobs remaining which the appellant can perform.

CONCLUSION

The appellant's claim is denied.

Scott Kuhlmey
Hearings Officer

APPENDIX C

45 U.S.C. 231a.

(a) Individuals eligible for annuities; disability standards; proof of continued disability

(1) The following described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e) (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title.

(i) individuals who have attained retirement age (as defined in section 216(1) of the Social Security Act (42 U.S.C.A. Section 416(1);

(ii) individuals who have attained the age of sixty and have completed thirty years of service;

(iii) individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individuals shall be reduced by 1/130 for each of the first 36 months that he or she is under retirement age (as defined in section 216(1) of the Social Security Act (42 U.S.C.A. Section 416(1) when the annuity begins to accrue and by 1/240 for each additional month that he or she is under retirement age (as defined in section 216(1) of the Social Security Act (42 U.S.C.A. Section 416 (1) when the annuity begins to accrue;

(iv) individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty; and

(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

20 C.F.R. Section 229.100 Evaluation of disability for any regular employment.

(a) General. The Board uses a set evaluation process, explained in paragraph (b) of this section, to determine whether a claimant is disabled for any regular employment. This evaluation process applies to employees, widow(er)s, and children who have applied for annuities under the Railroad Retirement Act based on disability for any regular employment. Regular employment means substantial gainful activity as that term is defined in Section 220.141.

(b) Steps in evaluating disability. A set order is followed to determine whether disability exists. The duration requirement, as described in 220.28, must, be met for a claimant to be found disabled. The Board reviews any current work activity, the severity of the claimant's impairment(s), the claimant's residual functional capacity, and the claimant's age, education, and work experience. If the Board finds that the claimant is disabled or is not disabled at any step in the process, the Board does not review further. (see Section 220.105 if the claimant is not currently disabled but was previously disabled for a specified period of time in the past.) The steps are as follows:

(1) Claimant is working. If the claimant is working, and the work is substantial gainful activity, the Board will find that he or she is not disabled regardiess of his or her impairments, age, education, or work experience. If the claimant is not performing substantial gainful activity, the Board will follow paragraph (2) of this section.

(2) Impairment(s) not severe. If the claimant does not have an impairment or combination of impairments which significantly limit his or her physical or mental ability to do basic work activities, the Board will find that the claimant is not disabled without consideration of age, education, or work experience. If the claimant has an impairment or combination of impairments which significantly limit his or her ability to do basic work activi-

ties, the Board will follow paragraph (3) of this section (See Section 220.102 (b) for a definition of basic work activities.)

(3) Impairment(s) meets or equals one in the Listing of Impairments. If the claimant has an impairment or combination of impairments which meets the duration requirement and such impairment is listed or is medically equal to one which is listed in the Listing of Impairments, the Board will find the claimant disabled without considering his or her age, education or work experience. (The Listing of Impairments is contained in Appendix 1 of this Part.) If the claimant's impairment or combination of impairments is not listed or is not medically equal to one which is listed in the Listing of Impairments, the Board will follow paragraph (4) of this section. (Medical equivalence is discussed in Section 220.111).

(4) Impairment(s) must prevent past relevant work. If the claimant's impairment or combination of impairments is not listed or is not medically equal to one which is listed in the Listing of Impairments, the Board will then review the claimant's residual functional capacity (see Section 220.120) and the physical and mental demands of past relevant work (see Section 220.130). If the Board determines that the claimant is still able to do his or her past relevant work, the Board will find that he or she is not disabled. If the claimant is unable to do his or her past relevant work, the Board will follow paragraph (5) of this section.

(5) Impairment(s) must prevent any other work (i) If the claimant is unable to do his or her past relevant work because of his or her impairment or combination of impairments, the Board will review the claimant's residual functional capacity and his or her age, education and work experience to determine if the claimant is able to do any other work. If the claimant cannot do other

work, the Board will find him or her disabled. If the claimant can do other work, the Board will find the claimant not disabled.

(ii) If the claimant has only a marginal education (see Section 220.129) and long work experience (i.e. 35 years or more) in which he or she only did arduous unskilled physical labor, and the claimant can no longer do this kind of work, the Board will use a different rule (see Section 220.127) to determine disability.

(c) Once a claimant has been found eligible to receive a disability annuity, the Board follows a somewhat different order of evaluation to determine whether the claimant's eligibility continues as explained in Section 220.180).

20 C.F.R. Section 404.1520 Evaluation of disability in general.

(a) Steps in evaluating disability. We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found

entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in Section 404.1594(f) (6).

(b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) When your impairment(s) meets or equals a listed impairment in appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age,

education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see 404.1562).

20 C.F.R. 220.26

"An employee, widow(er), or child is disabled for any regular employment when he or she is unable to do any substantial gainful activity because of a medically determinable physical or mental impairment which meets the duration requirement defined in 220.28. In the case of a widow(er), a permanent physical or mental impairment must have prevented work in any regular employment before the end of a specific period (see 220.30). In the case of a child, the permanent physical or mental impairment must have prevented work in any regular employment since before age 22. To meet this definition of disability, a claimant must have a severe impairment, which makes him or her unable to do any previous work or other substantial gainful activity which exists in the national economy. To determine whether a claimant is able to do any other work, the Board considers a claimant's residual functional capacity, age, education and work experience, see 220.100 for the process by which the Board evaluates disability for any regular employment. This process applies to employees, widow(er)s, or children who apply for annuities based on disability for any regular employment. This process does not apply to surviving divorced spouses or remarried widow(er)s who apply for annuities based on disability."

20 C.F.R. Section 220.187, Appendix 1

"1.05 Disorders of the spine

A. Arthritis manifested by ankylosis or fixation of the cervical or dorsolumbar spine at 30 degrees or more of flexion measured from the neutral position, with x-ray evidence of:

1. Calcification of the anterior and lateral ligaments; or
2. Bilateral ankylosis of the sacroiliac joints with abnormal apophyseal articulation; or

B. Osteoporosis, generalized (established by x-ray) manifested by pain and limitation of back motion and paravertebral muscle spasm with x-ray evidence of either:
1. Compression fracture of a vertebral body with loss of at least 50 percent of the estimated height of the vertebral body prior to the compression fracture, with no intervening direct traumatic episode; or
2. Multiple fractures of vertebrae with no intervening direct traumatic episode; or

C. Other vertebrogenic disorders (e.g., herniated nucleus puplosus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:
1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss."

45 U.S.C. 355

"(f) Review of final decision of Board by Courts of Appeals; costs

Any claimant, or any Railway labor organization organized in accordance with the provisions of the Railway Labor Act (45 U.S.C.A. Section 151 et. seq.), of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in

the United States Court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within thirty days after receipt of service, or within such additional time as the Court may allow. The Board shall file with the Court in which such petition has been filed the record upon which the findings and decision complained of are based, as provided in Section 2112 of Title 28. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the Court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the Court, and the Board shall file with the court the additional record. The judgment and decree of the Court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing

records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such reviews have been instituted or continued without reasonable ground."

45 U.S.C. 231 g.

Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act (45 U.S.C. 351 et. seq.) except that the time within which proceedings for the review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

28 U.S.C. 1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

20 C.F.R. 201.00 (h) App. 2

(h) The term "younger individual" is used to denote an individual age 18 through 49. For those within this group who are age 45-49, age is a less positive factor than for those

who are age 18-44. Accordingly for such individuals; (1) who are restricted to sedentary work, (2) who are unskilled or have no transferable skills, (3) who have no relevant past work or who can no longer perform vocationally relevant past work, and (4) who are either illiterate or unable to communicate in the English language, a finding of disabled is warranted. On the other hand, age is a more positive factor for those who are under age 45 and is usually not a significant factor in limiting such an individual's ability to make a vocational adjustment, even an adjustment to unskilled sedentary work, and even where the individual is illiterate or unable to communicate in English. However, a finding of disabled is not precluded for those individuals under age 45 who do not meet all of the criteria of a specific rule and who do not have the ability to perform a full range of sedentary work. The following examples are illustrative: Example 1: An individual under age 45 with a high school education can no longer do past work and is restricted to unskilled sedentary jobs because of a sever medically determinable cardiovascular impairment (which does not meet or equal the listings in Appendix 1). A permanent injury of the right hand limits the individual to sedentary jobs which do not require bilateral manual dexterity. None of the rules in Appendix 2 are applicable to this particular set of facts, because this individual cannot perform jobs requiring bilateral manual dexterity significantly compromises the only range of work for which the individual is otherwise qualified (i.e., sedentary), a finding of disabled would be appropriate. Example 2: An illiterate 41 year old individual with mild mental retardation (IQ of 78) is restricted to unskilled sedentary work and cannot perform vocationally relevant past work, which had consisted of unskilled agricultural field work; his or her particular characteristics do not specifically meet any of the rules in Appendix 2, because this individual cannot perform the full range of work defined as sedentary. In light of this adverse factors which further narrow the range of sedentary work for which

this individual is qualified, a finding of disabled is appropriate.

(i) While illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope, the primary work functions in the bulk of unskilled work relate to working with things (rather than with data or people) and in these work functions at the unskilled level, literacy or ability to communicate in English has the least significance. Similarly the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English.

20 C.F.R. 201.00 (a) App. 2.

"(a) Most sedentary occupations fall within the skilled, semi-skilled, professional, administrator, technical, clerical and benchwork classifications. Approximately 200 separate unskilled sedentary occupation can be identified, each representing numerous jobs in the national economy. Approximately 85 percent of these jobs are in the machine trades and benchwork occupational categories. These jobs (unskilled sedentary occupations) may be performed after a short demonstration or within 30 days."

20 C.F.F. 220.132

"To determine the physical exertion requirements of work in the national economy, jobs are classified as "sedentary", "light", "medium", "heavy", and "very heavy". These terms have the same meaning as they have in the Dictionary of Occupational Titles, published by the Department of Labor. In making disability determinations the Board uses the following definitions:

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying

articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and the other sedentary criteria are met."

TITLES II AND XVI: DETERMINING CAPABILITY TO DO OTHER WORK -- THE MEDICAL-VOCATIONAL RULES OF APPENDIX 2

PURPOSE: To clarify the manner in which the medical-vocational rules in Appendix 2 of Subpart P, Regulations No. 4, address the issue of capability to do other work, and to provide definitions of terms and concepts frequently used in evaluating disability under the medical-vocational rules.

CITATIONS (AUTHORITY): Sections 223(d) (2) (A) and 1614(a) (3) (B) of the Social Security Act; Regulations No. 4, Subpart P, sections 404.1505(a), 404.1520(f) (1), 404.1545, 404.1560-404.1561, 404.1563-404.1569, and Appendix 2; and Regulations No. 16, Subpart I, sections 416.905(a), 416.920(f) (1), 416.945, 416.960-416.961, and 416.963-416.969.

PERTINENT HISTORY: Under the sequential evaluation process for evaluating disability, if it is determined that an individual is not engaging in substantial gainful activity (SGA) and has one or more severe medically determinable impairments which do not meet or equal the Listing of Impairments but prevent him or her from performing past relevant work, evaluation of the individual's capability to do other work becomes necessary (see SSR 82-56, PPS-81, The Sequential Evaluation Process). In this, the fifth and last step in the process, the Individual's residual functional capacity (RFC) in conjunction with his or her age, education, and work experience, are considered to determine whether the individual can engage in any other substantial gainful work which exists in the national economy. (See the glossary at the end of the policy statement for definitions of terms and concepts commonly used in medical-vocational evaluation -- e.g., RFC.)

To increase the consistency and promote the uniformity with which disability determinations are made at this step at all levels of adjudication, the regulations for determining disability were expanded in February 1979. Appendix 2 was provided to establish specific numbered table rules for use in medical-

vocational evaluation.

Each numbered rule in the appendix resolves the issue of capability to do other work by addressing specific combinations of the factors (i.e., RFC, age, education, and work experience) that determine capability to do work other than that previously performed. The criteria for each factor contained within a rule are defined in the regulations. Resolution of the issue of capability to do other work is indicated in the "Decision" column (i.e., "Disabled" or "Not disabled") for the particular rule.

In using the rules of Appendix 2, we compare an individual's circumstances, as indicated by the findings with respect to RFC, age, education, and work experience, to the pertinent rule(s). Where the findings regarding each factor coincide with the criteria for the corresponding factor in a rule, that rule applies and directs a decision of "Disabled" or "Not disabled." Where one or more of the criteria of a rule are not met, no decision is directed; instead, the rules are used, in conjunction with the definitions and discussions in the text of the regulations, as guidance for decision-making.

Specific questions have arisen as to how we determine that the criteria of a rule are met and, where the criteria are not met, how we use the rules as a framework for decision-making. This Program Policy Statement (PPS) reviews and clarifies considerations underlying the rules to provide the necessary foundation for other PPS's that address issues about using the rules to adjudicate claims. (See the cross-reference section at the end of this PPS.)

POLICY STATEMENT: In making disability determinations and decisions at the last step of the sequential evaluation process, emphasis continues to be given to medical considerations. The rules of Appendix 2 assure that appropriate weight is afforded to the severity of the impairment within the context of medical-vocational evaluation to determine capability to do other work. For that purpose, RFC (i.e., what work-related activities an individual can do despite the impairment(s)) is

used to determine the maximum sustained capability for work. RFC is considered a factor affecting ability to adjust to work other than that previously performed. Capability to do other work is determined by considering the interaction of RFC with the other factors affecting vocational adaptability, i.e., age, education, and work experience. Education and work experience may also reflect acquired skills that can be used in skilled or semiskilled work other than that previously performed.

Work Capability as Established by RFC Alone -- the Occupational Base

In Appendix 2, work in the national economy is classified exertionally as sedentary, light, medium, heavy or very heavy. (Although the tables containing the specific numbered rules, i.e., Tables No. 1, 2, and 3, are limited to the sedentary, light, and medium levels of work, respectively, there is a specific rule pertaining to heavy and very heavy work, rule 204.00.) Each functional level is defined (in accordance with terms used by the United States Department of Labor) by the extent of its requirements in the primary strength activities of sitting, standing, walking, lifting, carrying, pushing, and pulling.

The rules of Appendix 2 use exertional capabilities (i.e., those required to perform the primary strength activities) to identify maximum sustained work capability. Under each rule, the capability considered is limited to that necessary to perform sustained work on a regular basis at the particular level of exertion.

The rules within a table are based on the same RFC. In each rule, the remaining exertional capabilities must be sufficient to allow performance of substantially all (nearly all) of the primary strength activities defining the particular level of exertion (i.e., sedentary, light, or medium). Also, the combined exertional capabilities do not allow performance of exertional levels beyond that in question.

Accordingly, the RFC determines a work capability that is exertionally sufficient to allow performance of at least substantially all of the activities of work at a particular level (e.g.,

sedentary, light, or medium), but is also insufficient to allow substantial performance of work at greater exertional levels. Sedentary exertional demands are less than light, which are, in turn, less than medium. In addition, RFC generally represents an exertional work capability for all work at any functional level(s) below that used in the table under consideration.

The exertional requirements of work at a particular functional level are the same regardless of whether the work is skilled, semiskilled, or unskilled. Therefore, RFC alone never establishes the capability for skilled or semiskilled work. Ability to perform skilled or semiskilled work depends on the presence of acquired skills which may be transferred to such work from past job experience above the unskilled level or the presence of recently completed education which allows for direct entry into skilled or semiskilled work. However, as noted in SSR 82-41, PPS-67, Work Skills and Their Transferability as Intended by the Expanded Vocational Factors Regulations Effective February 26, 1979, a person's RFC may prevent the transferability of skills.

Unskilled work may be performed by individuals with no work skills or no work experience. However, as shown in the table rules, individuals may not be expected to make a vocational adjustment to unskilled work in certain circumstances. A final requirement in determining an occupational base under the rules within a table is that the RFC reflects no impairment-caused limitation affecting performance of other than exertional activities, i.e.., no nonexertional limitation. Thus, the only impairment-caused limitations considered in each rule are exertional limitations. Accordingly, the RFC considered under each rule reflects the presence of nonexertional capabilities sufficient to perform unskilled work at the pertinent exertional levels.

The RFC addressed in a rule establishes the presence of an occupational base that is limited to and includes a full range (all or substantially all) of the unskilled occupations existing at the exertional level in question. The base established by RFC

also ordinarily includes all those occupations at any lower exertional level(s).

When the medical-vocational rules were promulgated, administrative notice was taken of the fact that it was possible to identify, at the unskilled level, approximately 200 sedentary occupations; approximately 1,600 sedentary and light occupations; and approximately 2,500 jobs in the national economy. (By "administrative notice" we mean our recognition that various authoritative publications identify occupations which exist in the national economy; these sources are listed in sections 404.1566 and 416.966 of the regulations.) Thus, as related to RFC, the occupational base considered in each rule consists of those unskilled occupations identified at the exertional level in question. (The base may be enhanced by the addition of specific skilled or semiskilled occupations that an individual can perform by reason of his or her education or work experience.)

The Issue of Work Adjustment

In the situations considered in the numbered table rules (those indicating decisions of "Disabled" as well as "Not disabled"), an individual has the RFC to perform a full range of the unskilled occupations relevant to the table. Each of these occupations represents numerous jobs in the national economy. However, the individual may not be able to adjust to those jobs because of adverse vocational factors.

The issue of whether a work adjustment is possible involves a determination as to whether the jobs whose requirements can be met provide an opportunity for adjusting to substantial and gainful work other than that previously performed. Accordingly, the issue of work adjustment is determined based on the interaction of the work capability represented by RFC (the remaining occupational base) with the other factors affecting capability for adjustment -- age, education, and work experience.

Each numbered rule in Appendix 2 includes an administrative evaluation which determines whether a work adjustment

should be possible. In each instance, the issue is decided based on the interaction between the person's occupational base as determined by RFC with his or her age, education, and work experience.

The ultimate question in the medical-vocational evaluation of the capability to do other work is whether work that an individual can do functionally and vocationally exists in the national economy. Whether work exists in the national economy for any particular individual depends on whether there is a significant number of jobs (in one or more occupations) with requirements that the individual is able to meet, considering his or her remaining physical and mental abilities and vocational qualifications.

The occupational base that is determined to be available based on RFC alone consists of a full range of occupations, each of which represents numerous jobs in the national economy. Where a rule indicates that a work adjustment is expected, a reasonable opportunity exists for adjusting to work other than that previously preformed. (Rules which include the transferability of a person's work skills to skilled or semi-skilled occupations within his or her RFC (or use of recent education for direct entry into such work) impose specific skilled or semiskilled occupations upon the unskilled occupational base.) Conversely, where the rules determine that a work adjustment is not expected, no reasonable opportunity exists for adjusting to substantial work. Thus, where the criteria of a rule are met, the issue as to the existence of work in the national economy for that individual is resolved. While there is no requirement to cite unskilled occupations where the criteria of a rule are met, specific examples of skilled or semiskilled occupations will be cited where a rule determines that a work adjustment above the unskilled level is expected.

GLOSSARY

The definitions of terms and related concepts provided in this glossary are to be used when an individual's capability to do other work is determined under the provisions of Appendix

2 of the regulations. The definitions are based on the regulations, the vocational reference material noted in section 200.00(b) of Appendix 2, and the adjudicative experience of the Social Security Administration.

Broad World of work. Work which exists at all exertional levels. It may include skilled and semiskilled work as well as unskilled work.

Environmental Conditions. Extremes of temperature, humidity, noise, vibration, fumes, odors, toxic conditions, dust, poor ventilation, hazards, etc.

Exertional Activity. One of the primary strength activities (sitting, standing, walking, lifting, carrying, pushing, and pulling) defining a level of work.

Exertional Capability. A capability required to perform an exertional activity.

Exertional Limitation. An impairment-caused limitation which affects capability to perform an exertional activity.

Exertional Level (Level of Exertion). A work classification defining the functional requirements of work in terms of the range of the primary strength activities required. The primary strength activities specifically associated with the sedentary, light, and medium levels of exertion are set forth in sections 404.1567 and 416.967 of the regulations.

The following elaborations of the activities needed to carry out the requirements of sedentary, light, and medium work are based on the same resource materials noted in section 200.00(b) of Appendix 2. They may be used by decision-makers to determine if an individual has the ability to perform the full range of sedentary, light, or medium work from an exertional standpoint.

1. *Sedentary work.* The regulations define sedentary work as involving lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although sitting is involved, a certain amount of walking and standing is often necessary

in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. By its very nature, work performed primarily in a seated position entails no significant stooping. Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions.

"Occasionally" means occurring from very little up to one-third of the time. Since being on one's feet is required "occasionally" at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday. Work processes in specific jobs will dictate how often and how long a person will need to be on his or her feet to obtain or return small articles.

2. *Light work.* The regulations define light work as lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted in a particular light job may be very little, a job is in this category when it requires a good deal of walking or standing -- the primary difference between sedentary and most light jobs. A job is also in this category when it involves sitting most of the time but with some pushing and pulling of arm-hand or leg-foot controls, which require greater exertion than in sedentary work; e.g., mattress sewing machine operator, motor-grader operator, and road-roller operator (skilled and semiskilled jobs in these particular instances). Relatively few unskilled light jobs are performed in a seated position.

   "Frequent" means occurring from one-third to two-thirds of the time. Since frequent lifting or carrying requires being on one's feet up to two-thirds of a workday, the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time. The lifting requirement for the majority of light jobs can be

accomplished with occasional, rather than frequent, stooping. Many unskilled light jobs are performed primarily in one location, with the ability to stand being more critical than the ability to walk. They require use of arms and hands to grasp and to hold and turn objects, and they generally do not require use of the fingers for fine activities to the extent required in much sedentary work.

3. *Medium work.* The regulations define medium work as lifting no more than 50 ponds at a time with frequent lifting or carrying of objects weighting up to 25 pounds. A full range of medium work requires standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday in order to meet the requirements of frequent lifting or carrying objects weighing up to 25 pounds. As in light work, sitting may occur intermittently during the remaining time. Use of the arms and hands is necessary to grasp, hold, and turn objects, as opposed to the finer activities in much sedentary work, which require precision use of the fingers as well as use of the hands and arms.

   The considerable lifting required for the full range of medium work usually requires frequent bending-stooping. (Stooping is a type of bending in which a person bends his or her body downward and forward by bending the spine at the waist.) Flexibility of the knees as well as the torso is important for this activity. (Crouching is bending both the legs and spine in order to bend the body downward and forward.) However, there are a relatively few occupations in the national economy which require exertion in terms of weights that must be lifted at times (or involve equivalent exertion in pushing or pulling), but are performed primarily in a sitting position, e.g., taxi driver, bus driver, and tank-truck driver (semiskilled jobs). In most medium jobs, being on one's feet for most of the workday is critical. Being able to do frequent lifting or carrying of objects weighing up to 25 pounds is often more critical than being able to lift up to 50 pounds at a time.

Full Range of Work. All or substantially all occupations existing at an exertional level.

Limited to. Does not exceed.

Maximum Sustained Work Capability. The highest functional level a person can perform on a regular work basis -- sedentary, light, medium, heavy, or very heavy work.

Nonexertional Impairment. Any impairment which does not directly affect the ability to sit, stand, work, lift, carry, push, or pull. This includes impairments which affect the mind, vision, hearing, speech, and use of the body to climb, balance, stoop, kneel, crouch, crawl, reach, handle, and use of the fingers for fine activities.

Nonexertional Limitation. An impairment-caused limitation of function which directly affects capability to perform work activities other than the primary strength activities.

Nonexertional Restriction (Environmental Restriction). An impairment-caused need to avoid one or more environmental conditions in a workplace.

Occupational Base. The number of occupations, as represented by RFC, that an individual is capable of performing. These "base" occupations are unskilled in terms of complexity. The regulations take notice of approximately 2,500 medium, light, and sedentary occupations; 1,600 light, and sedentary occupations; and 200 sedentary occupations. Each occupation represents numerous jobs in the national economy.)In individual situations, specific skilled or semiskilled occupations may be added to the base.)

Range of Work. Occupations existing at an exertional level.

Residual Functional Capacity. A medical assessment of what an individual can do in a work setting in spite of the functional limitations and environmental restrictions imposed by all of his or her medically determinable impairment(s). RFC is the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs.

Skill Level. A work classification whereby work is defined according to skill requirements. The requirements of the different skill levels are set forth in sections 404.1568 and 416.968 of the regulations as follows:

1. *Unskilled work.* Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding, and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending, and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled work.
2. *Semiskilled work.* Semiskilled work is work which needs some skills but does not require doing the more complex work duties. Semiskilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, material, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semiskilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.
3. *Skilled work.* Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the suitability and needed quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the

work. Other skilled jobs may require dealing with people, facts, or figures or abstract ideas at a high level of complexity.

For a further discussion of skills, see SSR 82-41, PPS-67, Work Skills and Their Transferability as Intended by the Expanded Vocational Factors Regulations Effective February 26, 1979.

Substantially All Activities. Nearly all (essentially all) of the activities required in an exertional range of work.

Vocational Factors: An Individual's Age, Education, and Work Experience.

1. *Age.* The regulations provide that older age is an increasingly adverse vocational factor for persons with severe impairments. The chronological ages 45, 50, 55 and 60 may be critical to a decision. However, the regulations also provide that age categories are not applied mechanically in borderline situations. For example, a rule for an individual of advanced age (55 or older) could be found applicable, in some circumstances, to an individual whose chronological age is 54 years and 11 months (closely approaching advanced age). No fixed guidelines as to when a borderline situation exists are provided since such guidelines would themselves reflect a mechanical approach.

   Under title II, a period of disability cannot begin after a worker's disability insured status has expired. When the person last met the insured status requirement before the date of adjudication, the oldest age to be considered is the person's age at the date last insured. In these situations, the person's age at the time of decision-making is immaterial.

2. *Education.* Unless there is evidence to contradict a person's statement as to the numerical grade level completed in school, the statement will be used to determine the person's educational abilities. The person's present level of reasoning, communication, and arithmetical ability may be higher

or lower than the level of formal education. Evidence of this includes the kinds of responsibilities the person had when working, any acquired work skills, daily activities, and hobbies, as well as the results of testing. Therefore, a person will meet the criteria for the different education levels specified in the regulations, not solely on the basis of his or her statements, but based upon all evidence pertinent to evaluating that person's educational capacities.

The criterion of "high school graduate or more -- provides for direct entry into skilled work" is met when there is little time lapse between the completion of formal education and the date of adjudication, and where the content of the education would enable individuals, with a minimal degree of job orientation, to begin performing the skilled job duties of certain identifiable occupations within their RFC.

3. *Previous Work Experience.* A person's work experience may be none, not vocationally relevant, unskilled, semiskilled, or skilled. To meet the criterion of "skilled or semiskilled -- skills transferable," a person must have performed work which is above the unskilled level of complexity, must have identifiable skills, and must be able to use these skills in specific skilled or semiskilled occupations within his or her RFC. (For additional guidance related to work experience, see SSR 82-41, PPS-67, Work Skills and Their Transferability as Intended by the Expanded Vocational Factors Regulations Effective February 26, 1979; SSR 82-61, PPS-72, Past Relevant Work: The Particular Job or the Occupation as Generally Performed; SSR 82-62, PPS-80, a Disability Claimant's Capacity to Do Past Relevant Work, in General; and SSR 82-63, PPS-79, Medical-Vocational Profiles Showing an Incapability to Make an Adjustment to Other Work.)

EFFECTIVE DATE: Final regulations providing the Medical-Vocational Guidelines were published in the *Federal Register* on November 28, 1978, at 43 FR 55349, effective February 26,

1979. They were rewritten to make them easier to understand and were published on August 20, 1980, at 45 FR 55566. The policies in this PPS are also effective as of February 26, 1979.

CROSS-REFERENCES: Program Operations Manual System, Part 4 (Disability Insurance State Manual Procedures), sections DI 2380E, 2382.1, 2382.2, 2384, and 2388A through E; SSR 83-11, PPS-102, Capability to Do Other Work -- The Exertionally Based Medical-Vocational Rules Met; SSR 83-12, PPS-103, Capability to Do Other Work -- The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of work or Between Ranges of Work; SSR 83-13, PPS-104, Capability to Do Other Work -- The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments; and SSR 83-14, PPS-105, Capability to Do Other Work -- The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments.

(PPS-103) **SSR 83-12**

TITLES II AND XVI: CAPABILITY TO DO OTHER WORK -- THE MEDICAL-VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING EXERTIONAL LIMITATIONS WITHIN A RANGE OF WORK OR BETWEEN RANGES OF WORK

PURPOSE: To clarify policies applicable in using the numbered table rules in Appendix 2 of Subpart P of the regulations as a framework for adjudicating claims in which an individual has only exertional limitations, and no specific rule applies because the individual's residual functional capacity (RFC) does not coincide with any one of the defined exertional ranges of work.

CITATIONS (AUTHORITY): Sections 223(d) (2) (A) and 1614(a) (3) (B) of the Social Security Act; Regulations No. 4, Subpart P, sections 404.1520 (f), 404.1545, 404.1561, 404.1566, 404.1567, 404.1569; Appendix 2 of Subpart P, section 200.00(d); Regulations No. 16, Subpart I, sections 416.920(f),

416.945, 416.961, 416.966, 416.967, and 416.969.

PERTINENT HISTORY: If a person has a severely medically determinable impairment which, though not meeting or equaling the criteria in the Listing of Impairments (Regulations No. 4, Subpart P, Appendix 1), prevents the person from performing past relevant work, we must decide whether he or she can do other work. The Medical-Vocational Guidelines which follow Appendix 1 as Appendix 2 contain numbered table rules which direct conclusions of "Disabled" or "Not disabled" where all of the individual findings coincide with those of a numbered rule. The table rules do not direct such conclusions when an individual's exertional RFC does not coincide with the exertional criteria of any one of the exertional ranges, i.e., sedentary, light, and medium, as defined in sections 404.1567 and 416.967 of the regulations. (See SSR 83-10, PPS-101, Determining Capability to Do Other Work -- The Medical-Vocational Rules of Appendix 2, for a discussion of exertion and ranges of work.) In some instances, an individual can do a little more or less than the exertion specified for a particular range of work; e.g., the person is considered to be physically capable of meeting the exertional demands of light work except that he or she can lift no more than 15 pounds at a time rather than 20 pounds, or he or she can fully meet the exertional demands of light work and can also perform part of the greater lifting requirement of medium work (such as up to 30 pounds at a time rather than 50 pounds at a time).

This Program Policy Statement (PPS) sets out the process of using the numbered rules in adjudicating those claims in which the exertional components of the RFC are less or greater than those of a specifically defined exertional range of work.

POLICY STATEMENT: Each numbered rule directs a conclusion as to whether an individual in a specific case situation is able to make an adjustment to work other than that previous performed. The decision is based on the person's remaining occupational base, as determined by RFC, in conjunction with his or her age, education, and work experience. (See the text

and glossary of SSR 83-10, PPS-101, Determining Capability to Do Other Work -- The Medical-Vocational Rules of Appendix 2.)

Where an individual's exertional RFC does not coincide with the definition of any one of the ranges of work as defined in sections 404.1567 and 416.967 of the regulations, the occupational base is affected and may or may not represent a significant number of jobs in terms of the rules directing a conclusion as to disability. The adjudicator will consider the extent of any erosion of the occupational base and assess its significance. In some instances, the restriction will be so slight that it would clearly have little effect on the occupational base. In cases of considerably greater restriction(s), the occupational base will obviously be affected. In still other instances, the restrictions of the occupational base will be less obvious.

Where the extent of erosion of the occupational base is not clear, the adjudicator will need to consult a vocational resource. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and appeals levels. In this PPS, the term vocational specialist (VS) describes all vocational resource personnel.

Adjudicative Guidance

The rules provide a basis for equitable consideration of the remaining occupational base, as follows:

1. If the individual's exertional capacity falls between two rules which direct the same conclusion, a finding of "Disabled" or "Not disabled", as appropriate, will follow.
   a. As an example, where an exertional RFC is between the sedentary and light exertional levels and a finding of "Disabled" is indicated under both relevant rules, a

finding of "Disabled" will follow. Even the complete occupational base (light) would not represent significant work for the individual.

b. As a second example, where an exertional RFC is between medium and light work, and both relevant rules direct a conclusion of "Not disabled," the occupational base is clearly more than what is required as representing significant numbers of jobs because even the rule for less exertion directs a decision of "Not disabled."

2. If the exertional level falls between two rules which direct opposite conclusions, i.e., "Not disabled" at the higher exertional level and "Disabled" at the lower exertional level, consider as follows:

   a. An exertional capacity that is only slightly reduced in terms of the regulatory criteria could indicate a sufficient remaining occupational base to satisfy the minimal requirements for a finding of "Not disabled."

   b. On the other hand, if the exertional capacity is significantly reduced in terms of the regulatory definition, it could indicate little more than the occupational base for the lower rule and could justify a finding of "Disabled."

   c. In situations where the rules would direct different conclusions, and the individual's exertional limitations are somewhere "in the middle" in terms of the regulatory criteria for exertional ranges of work, more difficult judgments are involved as to the sufficiency of the remaining occupational base to support a conclusion as to disability. Accordingly, VS assistance is advisable for these types of cases.

3. Another situation where VS assistance is advisable is where an individual's exertional RFC does not coincide with the full range of sedentary work. In such cases, equally difficult judgments are involved. Rather than having two rules which direct either the same or opposite conclusions,

the decision-maker would have only one relevant rule and would have to decide whether the full range of sedentary work is significantly compromised.

A VS can assess the effect of any limitation on the range of work at issue (e.g., the potential occupational base); advise whether the impaired person's RFC permits him or her to perform substantial numbers of occupations within the range of work at issue; identify jobs which are within the RFC, if they exist; and provide a statement of the incidence for such jobs in the region in which the person lives or in several regions of the country.

a. Where an individual's impairment has not met or equaled the criteria of the Listing of impairments at an earlier step in the sequence of adjudication, but the full range of sedentary work is significantly compromised, section 201.00(h) of Appendix 2 provides that a finding of "Disabled" is not precluded for even younger individuals. (The examples in that section are of significantly restricted occupational bases.)

b. Where a person can perform all of the requirements of sedentary work except, for example, a restriction to avoid frequent contact with petroleum based solvents, there is an insignificant compromise of the full range of sedentary work. Technically, because of the restriction, this person cannot perform the full range of sedentary work. However, this slight compromise within the full range of sedentary work (i.e., eliminating only the very few sedentary jobs in which frequent exposure to petroleum based solvents would be required) leaves the sedentary occupational base substantially intact. Using the rules as a framework, a finding of "Not disabled" would be appropriate.

Consideration of restrictions less clear in their effect than in the examples cited will require a more detailed review of the impact of the particular limitations on the performance of the full range of sedentary work. The assistance of a VS will usually

be required in assessing the extent of the reduced work capabilities caused by the limitations. The particular examples set out above illustrate cases in which nonexertional impairments impinge upon the full range of sedentary work. Using the rules as a framework, the same principles may be applied to determine whether there has been a significant compromise in those instances where additional exertional limitations impinge on the full range of sedentary work.

SPECIAL SITUATIONS

1. *Alternate Sitting and Standing*

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)

There are some jobs in the national economy -- typically professional and managerial ones -- in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS should be consulted to clarify the implica-

tions for the occupational base.

2. *Loss of Use of an Upper Extremity*

A person who has lost the use of an arm or hand because of amputation, paralysis, etc., obviously cannot perform jobs which require use of both arms or both hands. Loss of major use of an upper extremity is rather definitive in that there is a considerable absence of functional ability. As stated in SSR 82-51, PPS-85, Guidelines for Residual Functional Capacity Assessment in Musculoskeletal and Cardiovascular Impairments, an amputation above the elbow would limit a person to light work activity with additional limitations because of loss of bi-manual manipulation and difficulty or inability to handle bulky objects; effective use of the remaining hand may also be affected. An amputation below the elbow -- or partial loss of use of the extremity -- will require a more detailed evaluation of functional ability, including the condition of the remaining stump and the person's ability to use a prosthesis -- or the person's remaining ability for fine and gross manipulating.

Experience with persons who have lost the use of an upper extremity has shown that their potential occupational base is between the occupational bases for Table No. 1 (sedentary work) and Table No. 2 (light work). While individuals with this impairment have been known to perform selected occupations at nearly all exertional levels, the total number of occupations within their RFC's is less than the number represented by a full or wide range of light work. These individuals would generally not be expected to perform sedentary work because most unskilled sedentary jobs require good use of both hands. Persons who have the least remaining function would have only the lower occupational base, while those who have the most remaining function would have some of the higher occupational base added in terms of numbers of jobs which can be performed with this type of impairment. Given an individual's particular RFC, a VS will be able to determine the size of the

remaining occupational base, cite specific jobs within the individual's RFC, and provide a statement of the incidence of those jobs in the region of the individual's residence or in several regions of the country.

The Disability Determination or Decision Where a Claimant or Beneficiary Has Exertional Limitations Within a Range of Work or Between Ranges of Work

The usual requirements apply for a clear, persuasive, orderly rationale, reflecting the sequential evaluation process, with recitations of the evidence and specific findings of fact. (See SSR 82-56, PSS-81, The Sequential Evaluation Process.) Whenever vocational resources are used, and an individual is found to be not disabled, the determination or decision will include (1) citations of examples of occupations/jobs the person can do functionally and vocationally and (2) a statement of the incidence of such work in the region in which the individual resides or in several regions of the country.

EFFECTIVE DATE: Final regulations providing the Medical-Vocational Guidelines were published in the *Federal Register* on November 28, 1978, at 43 FR 55349, effective February 26, 1979. They were rewritten to make them easier to understand and were published on August 20, 1980, at 45 Fr 55566. The policies in this PPS are effective as of February 26, 1979.

CROSS-REFERENCES: Program Operations Manual System, Part 4 (Disability Insurance State Manual Procedures), sections DI 2380E, 2382.1, 2382.2, 2384, and 2388A - E; SSR 83-10, PPS-101, Determining Capability to Do Other Work -- The Medical-Vocational Rules of Appendix 2; SSR 83-11, PPS-102, Capability to Do Other Work -- The Exertionally Based Medical-Vocational Rules Met; SSR 83-13, PPS-104, Capability to Do Other Work -- The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments; and SSR 83-14, PPS-105, Capability to Do Other Work -- The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments.

(2)

Supreme Court, U.S.
FILED
APR 8 1994
OFFICE OF THE CLERK

No. 93-1271

In the Supreme Court of the United States

OCTOBER TERM, 1993

WESLEY R. HAMMONS, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether there was substantial evidence to support the Railroad Retirement Board's finding that petitioner was not entitled to a disability annuity under the Railroad Retirement Act, 45 U.S.C. 231a(a)(1)(v).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a8) is unpublished, but the decision is noted at 7 F.3d 1045 (Table). The decisions of the Railroad Retirement Board (Pet. App. b1) and the Hearings Officer (Pet. App. b2-b14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1993. On December 28, 1993, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 4, 1994. The petition for a writ of certiorari was filed on February 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 45 U.S.C. 231a provides:

(a) Individuals eligible for annuities; disability standards; proof of continued disability

(1) The following-described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title.

* * * * *

(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

* * * * *

2. 20 C.F.R. 220.100 provides in relevant part:

Evaluation of disability for any regular employment.

(a) *General.* The Board uses a set evaluation process, explained in paragraph (b) of this section, to determine whether a claimant is disabled for any regular employment. This evaluation process applies to employees, widow(er)s, and children who have applied for annuities under the Railroad Retirement

Act based on disability for any regular employment. Regular employment means substantial gainful activity as that term is defined in § 220.141.

(b) *Steps in evaluating disability* * * *

* * * * *

(5) *Impairment(s) must prevent any other work.* (i) If the claimant is unable to do his or her past relevant work because of his or her impairment or combination of impairments, the Board will review the claimant's residual functional capacity and his or her age, education and work experience to determine if the claimant is able to do any other work. If the claimant cannot do other work, the Board will find him or her disabled. If the claimant can do other work, the Board will find the claimant not disabled.

* * * * *

3. 20 C.F.R. 220.132 provides in relevant part:

Physical exertion requirements.

* * * * *

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and the other sedentary criteria are met.

STATEMENT

Petitioner worked for the Burlington Northern Railroad from July 1970 to January 1986. Pet. App. a2 n.1. He claims that he injured his back on December 30, 1985, when he was hit by a boxcar door, which caused him to hit a steel post. *Id.* at a1-a2 & n.1. He has not returned to his railroad job. *Id.* at b6-b7. Since petitioner left the railroad, his back injury consistently has given him some measure of pain. *Id.* at b5-b6. On January 25, 1990, petitioner applied for a disability annuity under the Railroad Retirement Act of 1974 (the Act), 45 U.S.C. 231 *et seq.*, which provides for a disability annuity for those former railroad employees "whose permanent physical or mental condition is such that they are unable to engage in any regular employment." 45 U.S.C. 231a(a)(1)(v). Petitioner's application was denied initially and upon reconsideration. Pet. App. b2.

Petitioner sought administrative review of the denial of benefits. The Hearings Officer reviewed the evidence in the record at considerable length, discussing the testimony of petitioner and each of the examining physicians as to the nature and extent of the pain experienced by petitioner. See Pet. App. b5-b13. After reviewing the evidence, the Hearings Officer found that petitioner "does have low back and shoulder pain," but that his claim that this pain restricted him from performing any work whatsoever was not credible. *Id.* at b12. Based on this credibility determination, the Hearings Officer found that while petitioner was not capable of returning to his former work at the railroad, he was capable of performing the full range of sedentary work. *Ibid.* Therefore, applying the medical-vocational guidelines contained in the Board's regulations, 20 C.F.R. Pt. 220, App. 2, the Hearings Officer found petitioner not

disabled. Pet. App. b13-b14. The Railroad Retirement Board affirmed and adopted the decision of the Hearings Officer. *Id.* at b1.

In an unpublished opinion, the court of appeals affirmed the decision of the Board. After reviewing the evidence in the record, the court determined that there is substantial evidence to support the Board's finding that petitioner's pain did not preclude him from doing sedentary work. Pet. App. a7-a8. Specifically, the court found that the "medical reports before the Hearings Officer permitted the inference that [petitioner] was overstating his pain problem." *Id.* at a6. The court also found that the Hearings Officer had taken petitioner's testimony concerning his pain into account in determining that petitioner's pain was "not a significant non-exertional impairment." *Id.* at a8. Because substantial evidence supported the Hearings Officer's finding of no significant non-exertional impairment, the court concluded that the Hearings Officer had not erred in applying the Board's medical-vocational guidelines (the "grids"). *Id.* at a7. Based on that conclusion, the court affirmed the decision of the Board denying petitioner a disability annuity. *Id.* at a8.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Petitioner contends that the court of appeals erred in finding that there is substantial evidence to support the Board's denial of his application for a disability annuity under the Railroad Retirement Act. Questions of substantial evidence do not warrant review in this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S.

474, 490-491 (1951). In any event, petitioner's contention is without merit.

Although formulated in a variety of guises, petitioner's submission reduces to the assertion that the Hearings Officer erroneously found that petitioner was capable of performing the full range of sedentary work. See Pet. 6-8, 9-11, 13-21. The Hearings Officer fully considered petitioner's testimony concerning the limitations his pain imposed on him. See Pet. App. b5-b7. After reviewing the testimony of his treating physicians, however, the Hearings Officer concluded that petitioner's testimony simply was not credible. *Id.* at b12. The Hearings Officer found that, although petitioner certainly experienced pain, the testimony of the physicians contradicted his claim that he was incapable of doing any work whatsoever:

> Prior to the appellant's surgery in December 1988, the treating physician and surgeon, P.L. Raby, M.D., stated repeatedly that the appellant had no neurological deficits of the lower extremities, that straight leg raising tests were normal as were his reflexes. The physician concluded that the appellant be oriented toward a lighter type of work. * * * The new treating physician (W.S. Piechal, D.O.) found the appellant to have no neurological deficits, stating that deep tendon reflexes were normal, straight leg raising tests negative, no evidence or [*sic*] atrophy, wasting, or fasiculations and reported that the appellant has exhibited a normal gait. He concluded in August 1991, that the appellant could frequently lift ten pounds, stand and walk for two to three hours and sit four to five hours in an eight hour workday consistent with sedentary work.

Id. at b12-b13. Based on this testimony of the treating physicians, the Hearings Officer concluded that the extent of the pain was not so great as to deprive petitioner of "the residual functional capacity to perform the full range of sedentary work." Pet. App. b13.

The court of appeals found that the medical reports supported the Hearings Officer's credibility determination that petitioner remained capable of performing sedentary work. Pet. App. a6. Having concluded that the Hearings Officer's finding of no non-exertional limitation was supported by substantial evidence, the court of appeals properly concluded that the application of the Board's medical-vocational guidelines to petitioner's claim was appropriate. Compare *Heckler* v. *Campbell*, 461 U.S. 458 (1983) (upholding use of medical-vocational guidelines under the Social Security Act). A non-exertional impairment precludes use of the medical-vocational guidelines only where such an impairment affects the claimant's ability to perform the range of work encompassed by the particular provision of the grids. *Channel* v. *Heckler*, 747 F.2d 577, 582 n.6 (10th Cir. 1984). In this case, the Hearings Officer properly determined that petitioner's non-exertional limitation did not preclude him from doing the full range of sedentary work.

2. Petitioner's contention (Pet. 22-23) that the court of appeals applied the wrong standard in reviewing the Board's decision is equally meritless. The statutory standard applied by this Court in *INS* v. *Elias-Zacarias*, 112 S. Ct. 812, 815 (1992), cited by the court of appeals (Pet. App. a8 n.5), is essentially indistinguishable from the standard provided by the Railroad Retirement Act. Compare 8 U.S.C. 1105a(a)(4) (the Board of Immigration Appeals' "findings of fact, if supported by reasonable, substantial, and probative evidence on the record consid-

ered as a whole, shall be conclusive"), with 45 U.S.C. 355(f) (1988 & Supp. IV 1992) ("The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive.").

In *Elias-Zacarias*, the Court held that the agency's determination under such a standard may be reversed only if "a reasonable factfinder would have to conclude," on the basis of the evidence in the record, that a decision should be rendered for the challenging party, 112 S. Ct. at 815—*i.e.*, only if "the evidence * * * was so compelling that no reasonable factfinder could fail to find" in favor of that party, *id.* at 817. The court of appeals adhered to that standard. It concluded that "the record permits, and therefore supports," the Hearings Officer's finding that petitioner had the residual functional capacity to perform the full range of sedentary work. Correspondingly, the court concluded that the record "did not *compel*" a finding in favor of petitioner. Pet. App. a8 & n.5. Petitioner's objection to the court of appeals' articulation of the nature of its review accordingly does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994